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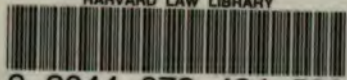
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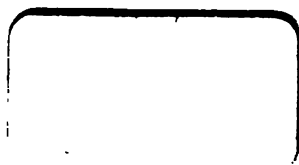
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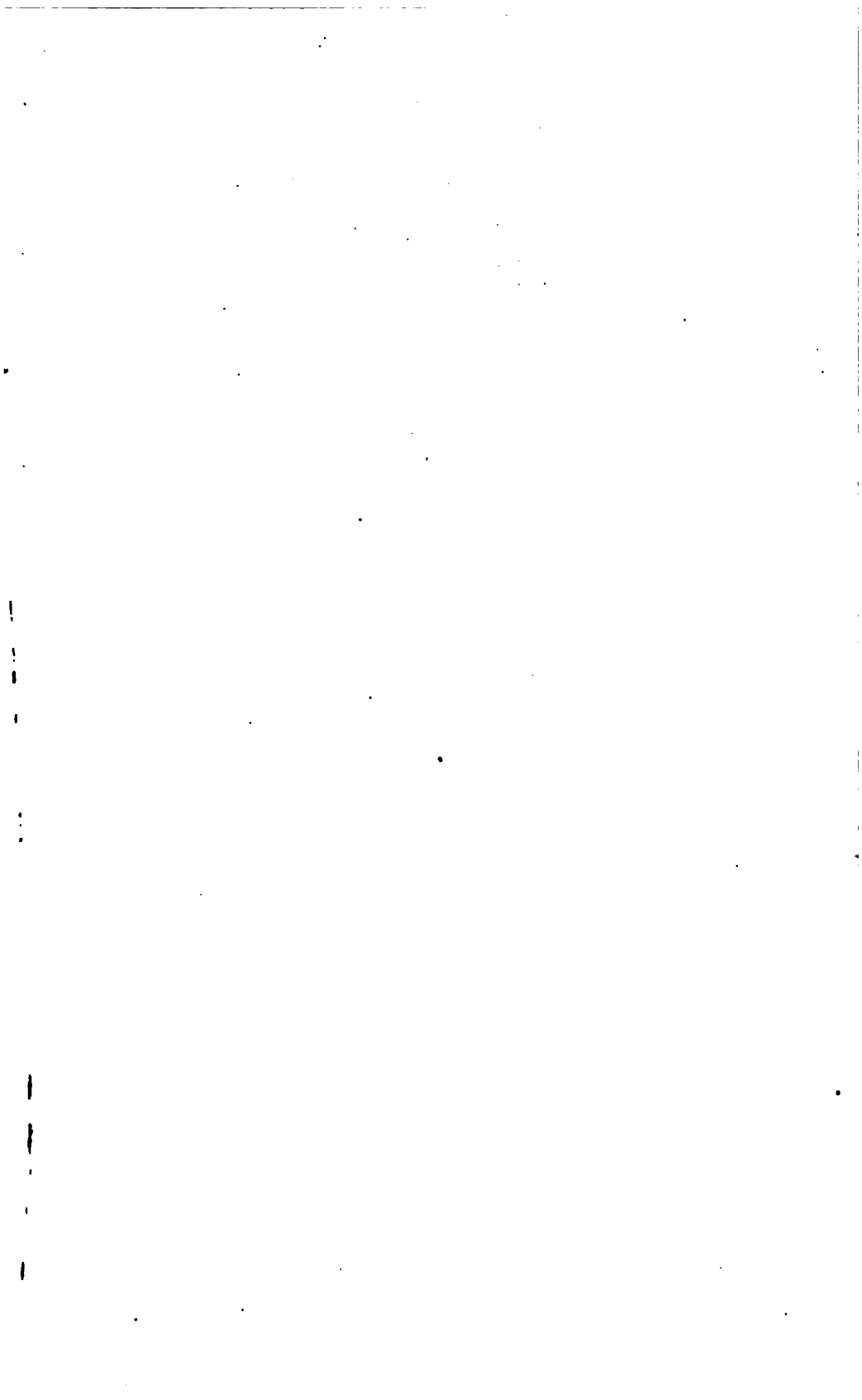


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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

By AUGUSTUS N. MARTIN,
OFFICIAL REPORTER.

VOL. LXVI.,

CONTAINING CASES DECIDED AT THE MAY TERM, 1879,
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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. JAMES L. WORDEN.*†

HON. WILLIAM E. NIBLACK.†

HON. HORACE P. BIDDLE.†

HON. SAMUEL E. PERKINS.†

HON. GEORGE V. HOWK.†

*Chief Justice at the May Term, 1879.

†Term of office commenced January 4th, 1875.

†Term of office commenced January 1st, 1877.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
GABRIEL SCHMUCK.

SHERIFF,
JAMES ELDER.

LIBRARIAN,
FREDERICK HEINER.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1879, IN THE
SIXTY-THIRD YEAR OF THE STATE.

FRAZER, EXECUTOR, v. BOSS.

DECEDENTS' ESTATES.—Claim.—Amendment.—Additional Paragraph.—

Waiver.—After the transfer, from the appearance to the issue docket, of a claim filed against the estate of a testator, the claimant, without objection by the executor, filed an additional paragraph, stating substantially the same cause of action embraced in the original claim, though in a different manner. The executor, after having appeared and filed a demurrer, withdrew the demurrer and moved to strike out such paragraph.

Held, that, by his appearance and demurrer, the executor waived the objection that such paragraph had not been filed and placed on the appearance docket, and, therefore, that the motion should be overruled.

PRACTICE.—Answers to Interrogatories.—Verdict.—Where answers to interrogatories are not inconsistent with the general verdict, judgment *non obstante* can not be rendered.

SAME.—Answers Consistent with Complaint.—Where there is a general verdict for the plaintiff, accompanied by answers to interrogatories, a motion by the defendant for judgment *non obstante* on specified paragraphs of the complaint should be overruled, if the answers be not inconsistent with the plaintiff's right to recover on either of such paragraphs.

66	1
139	279
66	1
152	614
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157	549
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1169	444

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CONTRACT.—Sale.—Bailment.—Transfer of Goods, on Promise to Marry—Breach of Promise, and Death of Promisor.—Action for Value of the Goods.—Verdict.—Answers to Interrogatories.—Complaint.—Demand.—Rescission.

—Fraud.—In an action against a decedent's estate, wherein one paragraph of the complaint counted upon a promissory note executed to the plaintiff by the deceased, another was in the nature of a *quantum valebat* for goods sold and delivered to the deceased by the plaintiff, and a third was based upon contract and counted upon bailment of the same goods to the deceased by the plaintiff, to be returned on demand, the jury, with their general verdict for the plaintiff, found specially, in answer to interrogatories, that the deceased, intending to cheat and defraud the plaintiff, and intending not to keep his promise, had obtained from the plaintiff the transfer of the goods in question by promising to marry the plaintiff; that the goods had been transferred "upon contract of sale thereof to" the deceased by the plaintiff, and "upon an agreement by him to return the same to her on demand;" that the goods were then of the value alleged in the complaint; that the deceased had married another woman, and had failed either to return the goods or to pay therefor; and that an unsuccessful demand had been made upon both the deceased and his executor.

Held, that the defendant was not entitled to judgment on the answers notwithstanding the verdict.

Held, also, that the answers are inconsistent with the paragraph counting on bailment, but are consistent with the *quantum valebat* count, and, therefore, that the verdict was founded upon the counts upon the *quantum valebat* and the note.

Held, also, that the answers show a contract of sale of the goods (reserving to the plaintiff the right to rescind on demand), upon an agreement to marry, fraudulently made by the deceased with intent to cheat the plaintiff out of the goods.

Held, also, that, upon breach of the marriage promise, the deceased in his lifetime, and his estate on his death, became liable for the value of the goods.

SAME.—Mutilation of Promissory Note.—Evidence Explaining.—It appearing that the signature to the note in suit had been torn off, and then re-attached, it was proper to admit the note in evidence on proof tending to show that the mutilation was the innocent act of a child.

SAME.—Promissory Note, as prima facie Evidence of Settlement.—Instruction.—There being evidence tending to disprove a settlement between the plaintiff and deceased embracing the goods in question, it was proper to instruct the jury that, while the execution of the note was *prima facie* evidence of settlement, they should look to all the evidence to determine whether there had been a settlement.

SAME.—Interest.—When it Commences.—Demand.—The plaintiff was enti-

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tled to interest on the value of the goods sold, not from the date of sale, but from the date of plaintiff's demand, made after breach of the marriage promise.

SAME.—*Common Law.*—Interest is of purely statutory, and not of common-law, origin.

SAME.—*Admission of Record.*—*Payment.*—*Evidence.*—*Presumption.*—An admission, in a complaint to recover for goods sold and delivered, that a specified amount has been paid, is conclusive upon the plaintiff, and, in the absence of evidence to the contrary, is presumed to have been made on the date of the sale.

SUPREME COURT.—*Remittitur of Part of Judgment.*—*Practice.*—Where, from the evidence and findings of the jury, the true amount that a party is entitled to recover can be ascertained by the Supreme Court, the judgment may be affirmed as to that amount, on condition of a remittitur of the residue.

SAME.—*Erroneous Instruction as to Interest.*—This rule may be applied notwithstanding an erroneous instruction by the lower court solely as to the time when interest should begin to run on the principal.

From the Whitley Circuit Court.

J. S. Frazer and W. D. Frazer, for appellant.

W. S. Marshall, J. H. Carpenter and J. W. Cook, for appellee.

WORDEN, J.—Nellie P. Boss, the appellee, filed her claim in the Kosciusko Circuit Court, against the estate of Jacob Boss, deceased, in four paragraphs.

The executor not admitting the claim, the cause was transferred to the issue docket for trial. Afterward, the appellee, by leave of the court, filed two additional paragraphs to her complaint, numbered 5 and 6.

The cause went finally, on change of venue, to the county of Whitley for trial.

The first and third paragraphs of the complaint went out on demurrer, and the fifth was withdrawn, and no question arises upon them here. The cause was tried on the second, fourth and sixth, which were as follows :

“2d. And, for a further and second cause of action and claim against the estate of said deceased, Jacob Boss, the plaintiff herein, Nellie P. Boss, complains of said estate,

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and says: That said decedent, in his lifetime and at the time of his death, was indebted to the plaintiff in the sum of six thousand dollars, for goods, wares, merchandise and fixtures, sold and delivered by the plaintiff to said decedent, on, to wit, the 10th day of October, 1872, which said goods, wares, merchandise and fixtures were not invoiced, but sold and delivered as aforesaid in bulk, and comprised all the goods, wares, merchandise and fixtures then in and belonging to plaintiff's store, then in the store-room rented by her of Metcalf Beck, on Centre street, in Warsaw, Indiana; that said decedent took possession of said property forthwith, and thereafter held, used and converted to his own use, and sold said goods, wares, merchandise and fixtures; wherefore she can not furnish a more particular bill of particulars of said property; that said sum of six thousand dollars, for which said goods were sold as aforesaid, is yet due and unpaid, with the accumulated legal interest thereon, except the sum of one thousand dollars, and that there is no set-off or counter-claim to said balance due, and that no notes or other evidence of said balance were given by said decedent to this plaintiff; and the plaintiff demands an allowance for six thousand dollars against said estate, and for all other and proper relief; that said Jacob Boss departed this life, testate, on the 28th of August, 1874.

"4th. And, for a further and fourth cause of action, Nellie P. Boss complains of the estate of Jacob Boss, deceased, and says that the said decedent, on the 5th day of July, 1872, by his note, a copy of which is filed herewith, promised to pay the plaintiff, by the name of Nellie P. Lane the sum of five hundred dollars, the copy of which note is marked 'Exhibit A,' and made a part of this paragraph of complaint, which remains due and wholly unpaid, and the same, with the accrued interest thereon, is due to the complainant, and she believes she ought to recover the sum of seven hundred dollars on said note from

said estate, and she demands an allowance and judgment accordingly."

A copy of a note corresponding with that described, payable one month after date, with ten per cent. interest, is set out.

"6th. And, for a sixth and further cause of complaint against the estate of said decedent, the plaintiff says, that, on or about October 25th, 1872, she delivered into the possession of said decedent a large stock of jewelry, goods, wares, merchandise, fixtures and personal property, in the town (now city) of Warsaw, Indiana, of the value of six thousand dollars, with the contract that said goods, wares, merchandise, fixtures, and personal property should be returned to this plaintiff upon demand; that the plaintiff did not take an inventory of said goods at the time, but that they were so delivered in bulk, and she can not file a bill of the particulars thereof. Plaintiff avers, that thereafter, and previous to the death of said Jacob Boss, she made a demand upon him for the return of all of said goods, but that he refused so to return the same, or any part thereof, as by his contract aforesaid he was bound to do; that said Boss departed this life on the 28th day of August, 1874, testate, and that the Hon. James S. Frazer was thereafter duly and legally qualified as the executor of said decedent's estate, by the circuit court of Kosciusko county, State of Indiana, and is still such executor of said estate.

"Plaintiff further avers, that, on the — day of —, 187—, she demanded a return of said goods, wares, merchandise, personal property and fixtures so delivered by her to said decedent as aforesaid, of and from said executor, but that he wholly refused to so deliver the same, or any part thereof. Plaintiff further avers, that said goods, wares, merchandise, fixtures and personal property were all converted by said decedent and his legal repre-

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sentatives, and no part thereof returned to or paid for to this plaintiff, to the damage of this plaintiff and her estate in the sum of six thousand dollars, with interest thereon since October 25th, 1872, and for which sum she demands judgment, and for other proper relief."

To the original four paragraphs the appellee appended her affidavit in the usual form; and to the sixth she appended her affidavit, "that the above claim against the estate of Jacob Boss, deceased, is in all respects just, and that the balance, as shown, of six thousand dollars, is due and remains wholly unpaid, except six hundred dollars."

The defendant pleaded the general denial, payment, and other matters not necessary to be stated for the purposes of this opinion.

The issues being joined, the cause was submitted to a jury for trial, who returned a verdict for the plaintiff, for the sum of eight thousand five hundred and thirty dollars and forty cents. The jury also returned the appended answers to the following interrogatories propounded to them at the instance of the plaintiff:

"1st. Did not the plaintiff transfer to Jacob Boss, deceased, the goods, furniture and fixtures described in the complaint?

"Ans. She did.

"2d. Were not said goods, furniture and fixtures then worth six thousand dollars?

"Ans. They were.

"3d. Was not said transfer made on or about October 25th, 1872?

"Ans. It was.

"4th. Did not said Boss procure said transfer of said goods, fixtures and furniture to him by fraud?

"Ans. He did.

"5th. Did not said decedent procure the transfer of said property, by his promise to marry the plaintiff?

"Ans. He did.

"6th. Was not such promise of marriage fraudulently made by said Boss, to secure the transfer of said property to him?

"Ans. It was.

"7th. Is it not true that said Boss, when he so promised to marry the plaintiff, did not intend to marry her?

"Ans. It is.

"8th. Did he not make such promise of marriage for the purpose of cheating the plaintiff out of said property?

"Ans. Yes, he did.

"9th. Did not said Boss refuse to keep said promise of marriage, and did he not marry another woman?

"Ans. He did.

"10th. Had not said Boss and the plaintiff been previously married and divorced?

"Ans. Yes.

"11th. Were not the goods and property sued for transferred by the plaintiff to said Boss, upon their agreement for a further marriage?

"Ans. They were.

"12th. Does the evidence show that the four-hundred-dollar note which has gone into judgment, was given on a final settlement between the plaintiff and said Boss, on the transfer of said property to said Boss?

"Ans. No.

"13th. Does not the evidence show that the claim for said property remained unsettled after the execution of said four-hundred-dollar note?

"Ans. Yes.

"14th. Was not said property delivered by the plaintiff to said Boss, upon his agreement to marry the plaintiff, and did he not wholly fail to perform any part of such agreement?

"Ans. Yes, he did.

"15th. Was not the five-hundred-dollar note offered in evidence torn by the plaintiff's infant child, so that

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Boss' name was separated from the body of the note, without the plaintiff's consent?

"Ans. Yes."

And the jury returned the appended answers to the following interrogatories, propounded at the instance of the defendant:

"1st. What was the actual cash value of the goods, furniture and fixtures mentioned in the complaint, at the time the same was transferred by the plaintiff to Jacob Boss, deceased?

"Ans. Six thousand dollars.

"2d. If said property was so transferred by the plaintiff to said Jacob Boss, was it so done upon contract of sale thereof to him?

"Ans. Yes.

"3d. If said property was transferred by the plaintiff to Boss, was it so transferred upon an agreement by him to return the same to her on demand?

"Ans. It was.

"4th. What was the agreement, if any, between the plaintiff and said Boss, upon which the plaintiff delivered said property to said Boss? State it fully.

"Ans. Upon an agreement of marriage.

"5th. Did Boss pay the plaintiff any sum of money, and how much, upon a purchase of said property, at the time of the delivery thereof by her to him?

"Ans. He did not.

"6th. Did said Boss, at or before the delivery of said property to him by the plaintiff, deliver to her any promissory note in consideration of said property, and, if so, has she brought a suit upon said note, and obtained a judgment upon it?

"Ans. No.

"7th. How much, if any thing, was said property worth, above any payment made therefor to the plaintiff

by Boss, cash and note included? and, if worth more, did Boss agree with the plaintiff to marry her in consequence thereof?

“Ans. We do not find that there was any payment made on the property.

“8th. What part of Boss’ agreement, if any, in consideration of which the plaintiff delivered said property to Boss, has not been performed? State it fully.

“Ans. No part whatever.

“9th. State whether or not the note mentioned in the complaint, when the same was produced in evidence, showed by its appearance that the signature thereof had been torn off and attached again by pasting?

“Ans. It did.

“10th. If you answer the last question in the affirmative, then state why and how it was so torn, or, if the evidence does not explain it, say so.

“Ans. The evidence does explain; it was torn off by plaintiff’s infant child.”

The defendant moved for judgment in his favor, on the answers of the jury to the interrogatories, notwithstanding the general verdict, but the motion was overruled.

He then moved, on the same ground, for judgment in his favor, on the second and sixth paragraphs of the complaint, but this motion was also overruled.

He then moved for a new trial, filing written causes therefor, but this motion was overruled, and judgment was rendered for the plaintiff, on the verdict.

Exceptions were duly taken, that preserve the questions discussed by the counsel for the appellant, and errors are properly assigned, which we need not state in detail. We proceed to consider the grounds urged by counsel for the appellant, for a reversal of the judgment.

The sixth paragraph of the complaint, as has been already stated, was not filed until after the cause had been

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transferred from the appearance docket to the issue docket for trial. In short, it was never placed upon the appearance docket at all for rejection or allowance by the executor. But the appellant, without objection, appeared to it and filed a demurrer thereto. He afterward withdrew the demurrer, and moved to strike out the paragraph, but the motion was overruled. This, it is claimed, was error.

The circuit court of Kosciusko county had jurisdiction of the subject-matter; and the executor, by appearing to the paragraph and filing his demurrer thereto, waived the objection that the claim had not been before filed and placed upon the appearance docket. This point was fully considered and settled in the case of *Morrison v. Kramer*, 58 Ind. 38. There was, therefore, no error in overruling the motion to strike out the paragraph. Perhaps, also, the court would have been justified in refusing to strike out the paragraph, had the appellant not appeared and demurred to it, on the ground that it stated, in a different manner, in order to meet the exigencies of the evidence, substantially the same subject of claim as that previously filed and placed upon the appearance docket, and embraced in the second paragraph. But upon this point we decide nothing.

It is not pressed that the court erred in overruling the motion to render judgment for the defendant, on the answers to interrogatories, notwithstanding the general verdict. It is clear, we think, that no error was committed in that respect. There is nothing in the answers that is inconsistent with the plaintiff's right to recover on the note counted upon in the fourth paragraph of the complaint.

But it is insisted that error was committed in not rendering judgment for the defendant, on the answers to interrogatories, on the second and sixth paragraphs of the complaint, in accordance with the motion in that behalf. If the answers to the interrogatories were not inconsistent

with the plaintiff's right to recover on either of the paragraphs mentioned, the motion, as made, was properly overruled.

The second paragraph is in the nature of a *quantum valeret* count for goods sold and delivered. The sixth paragraph is, as we construe it, based upon contract, and counts upon the bailment of the goods to the deceased by the plaintiff, to be delivered to her again upon demand.

It is abundantly clear, from the answers to the interrogatories, that there was a contract of sale of the goods, by virtue of which they were delivered by the plaintiff to the deceased. In the answer of the jury to the second interrogatory propounded by the defendant, the jury expressly say, that the property was transferred by the plaintiff to said deceased upon a contract of sale thereof to him. This precludes the idea that the goods were bailed to the deceased, or that he received them as bailee. The answers, therefore, seem to us to be inconsistent with the right of the plaintiff to recover upon the sixth paragraph of the complaint, which counts upon a bailment and not a sale of the goods. It seems to us, looking at the answers of the jury to the interrogatories, that their verdict must have been intended to be based upon the second and fourth paragraphs.

It remains to enquire, whether the answers to interrogatories are inconsistent with the plaintiff's right to recover on the second paragraph.

The answers to interrogatories, at first blush, may seem to be inconsistent with themselves. We have seen that they show clearly a sale of the goods by the plaintiff to the deceased, and a delivery in pursuance of the sale. While the property was sold by the plaintiff to the deceased, and delivered in pursuance of the sale, the jury say, in answer to the third interrogatory propounded by the defendant, that the property was transferred upon an agree-

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ment by the deceased to return them to the plaintiff on demand. These answers, we think, may be reconciled on the theory that there was a sale and delivery of the property by the plaintiff to the deceased, and at the same time a contract between the parties, by which the plaintiff was to have the right to rescind the contract of sale and have the property restored to her on demand.

It appears, then, by the answers, that the property was sold and delivered by the plaintiff to the deceased, with an agreement that she might rescind the contract of sale and have the property restored to her on demand; that the sale was made upon an agreement by the deceased to marry the plaintiff, which agreement he fraudulently entered into for the purpose of obtaining the property from the plaintiff, and which he did not intend to fulfil, and which he broke by marrying another woman. In all this there is nothing inconsistent with the plaintiff's right to recover upon the second paragraph of her complaint. The fraud imputed to the deceased, in making the contract of marriage without any intention of fulfilling it, and for the purpose of possessing himself of the property, we do not regard at all as an essential element in the plaintiff's right of recovery.

The deceased acquired the plaintiff's goods upon a contract which he failed to perform. He held them, therefore, without consideration, or rather, perhaps, upon a consideration that failed. He was in his lifetime, and his estate now is, upon the plainest principles of equity, liable to her for the value of the goods. See 2 Chitty Con., 11th Am. ed., pp. 920, 921. In a note to the page last cited, it is said: "So, in any case, where money is advanced upon an executory contract, which the contracting party fails to perform, it is in the election of the other party to treat the contract as rescinded, to disaffirm it, and recover back his money, as money paid upon a consideration which has failed." In the same

note it is again said : " Where money is paid by one party in contemplation of some act to be done by the other, which is the sole consideration of the payment, and the thing stipulated to be done is not performed, the money may be recovered back." There can be no difference in principle between money paid in such case, and goods advanced. Where goods are thus sold upon a contract which the other party fails to perform, the party selling the goods must have his action to recover on the implied obligation to pay what they are reasonably worth.

To be sure, the right of action upon contracts to marry does not survive, but dies with the person. 2 R. S. 1876, p. 309, sec. 783. This, however, was not an action to recover damages for the breach of the marriage contract. It was an action to recover as for goods sold and delivered, based upon the failure of the deceased to perform the agreement on his part; and, in our opinion, it was well brought.

It may be remarked, that the cases of *Chamberlain v. Williamson*, 2 M. & S. 408, and *Stebbins v. Palmer*, 1 Pick. 71, give countenance to the idea that where a breach of contract to marry occasions injury to the estate of the promisee, and is not confined to personal injury, the action survives for the purpose of recovering the injury to the estate. See also 1 Chitty Pl., 16th Am. ed., p. 22 and note *o*. We, however, do not decide the point upon this ground, but upon that above stated. We are, therefore, of opinion, that no error was committed in overruling the motion to render judgment for the defendant on the answer of the jury to interrogatories, on the second and sixth paragraphs of the complaint.

We may here notice the 13th instruction given by the court to the jury, to which objection is made. The instruction need not be set out. It was in harmony with our views of the law in relation to the plaintiff's right to

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recover as for goods sold and delivered, upon the breach by the deceased of his contract to marry the plaintiff.

We come to the questions arising on the motion for a new trial.

On the trial of the cause, the plaintiff offered in evidence the note described in the fourth paragraph of the complaint, and it appeared that the note had been torn in such a manner as to take off a part of the name of the deceased, but the parts had been pasted together again, so that the note was complete. The defendant objected to the introduction of the note in evidence on account of the mutilation, and thereupon the plaintiff gave evidence tending, as we think, to show that it was innocently done, in the manner stated in the answer of the jury to one of the interrogatories. And thereupon the court permitted the note to go in evidence to the jury, over the exception of the defendant. We are of opinion, that, if any evidence was necessary to explain the mutilation of the note, and that it was innocently done, the evidence given tended to furnish the explanation. The only doubt about the evidence arose in reference to the identity of the paper, the tearing of which was accounted for; but we think it tended to show that it was the note in question, and that the evidence was sufficient to let the note go to the jury.

The defendant asked the court to charge the jury, "that the execution and delivery of the note of October 25th, 1872, by Jacob Boss to Nellie P. Boss, was *prima facie* evidence that all prior accounts between the parties were settled at the time of giving said note, and the legal presumption is, that, at the date of giving said note, all prior accounts were settled between the said Jacob Boss and Nellie P. Boss."

This charge the court refused, but it had given the same charge in substance, adding to the charge given the following explanation:

“What is meant by a *prima facie* case is, that, in the absence of all other proof, that would be deemed and taken to be true, and would be sufficient to establish the fact, but it may be overcome by other proof; so, in considering the *prima facie* case made by the execution of the note, you should also consider all the other evidence in the case bearing upon the question of a settlement.”

We understand from one of the briefs of counsel for the appellant, that the correctness, as matter of law, of the matter thus added by the court, is not disputed; but it is insisted that there was no evidence to which it was applicable. In other words, it is insisted that there was no evidence that, at the giving of the note mentioned, there was not a full settlement of all matters between the parties.

The evidence in the cause is voluminous, but we have read it carefully, and are of opinion that there was evidence to which the entire charge was applicable, tending to disprove such settlement.

Some objections are made to the rulings of the court in rejecting certain evidence offered, but we are of opinion that no error was committed in this respect, that should reverse the judgment. This opinion has necessarily extended to such a length, that it is not thought advisable to further extend it by stating these objections in detail.

We can not reverse the judgment on the evidence as to the general merits of the cause. In this respect, the verdict was fully sustained by the evidence. The evidence of some of the witnesses, as well as some of the statements imputed to the deceased, strongly tended to show that the stock of goods was worth the full amount claimed for it by the plaintiff, \$6,000. On the other hand, other evidence tended to show that it was worth less than half that sum. This, however, was a question for the jury, and we will not disturb their verdict on the ground of an over-estimate of the value of the goods.

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But, in any aspect of the case, the damages assessed were clearly excessive; the amount of the recovery was too large; and this was one of the grounds assigned for a new trial.

We have made no computation in this respect, but suppose that the verdict, from its amount, must have included the note, with the interest upon it, and the \$6,000 for the goods, with the interest thereon from the time of the sale.

As has been seen, the recovery must have been had upon the second and fourth paragraphs of the complaint. The fourth was based upon the note, so that the second was the only one that upheld the recovery for the goods. But in the second paragraph the plaintiff claimed that the whole of the \$6,000 with interest was due and unpaid, except the sum of one thousand dollars. This was an admission of record that one thousand dollars of the claim had been paid or satisfied; and the admission, for the purposes of the case, was conclusive and could not be controverted. 1 Greenl. Ev., sec. 27. We do not decide that the court might not have given leave to amend the complaint in this respect, upon proper application. If such amendment could have been made, no application for that purpose was made to the court. We must take it, then, to have been conclusively admitted by the pleading, that one thousand dollars of the amount had been paid or satisfied. And we think it reasonable to refer the payment or satisfaction to the time when the goods were sold.

This leaves but \$5,000, and, at most, the interest thereon from the time of the sale of the goods, which could be recovered on the second paragraph. And, in respect to the interest, we think the court fell into an error in its charge to the jury. The court, in its 9th charge, directed the jury, in substance, that, if they found for the plaintiff on the second paragraph, they should allow interest at the

rate of six per cent. from the date of the sale of the goods. This charge, as thus unqualifiedly given, was erroneous.

The right to recover interest upon the loan or forbearance of money does not seem to have existed at common law, but is the creature of statute. In Ord on Usury, side page 31, it is said: "Among us, the statute of Henry VIII. was the first that gave any connivance to the practice of lending at interest. Till that time, all degrees of it were looked upon as equally illegal; and all persons, who took it, were indiscriminately subjected to the same punishment."

Our statute on the subject of interest provides, among other things, that, "On money due on any instrument in writing, or on settlement of account from the day the balance shall have been agreed upon, on money had and received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof, on money loaned or due and withheld by unreasonable delay of payment, interest shall be allowed at the rate of six dollars a year on one hundred dollars, or at such rate as the parties may agree upon, not exceeding six dollars a year on one hundred dollars." 1 R. S. 1876, p. 600, sec. 4.

The case made by the paragraph does not come within any of the specifications of the statute, unless it be that naming "money * * due and withheld by unreasonable delay of payment."

But it was a question for the jury, and not for the court, to determine, whether the money due for the goods was withheld by unreasonable delay of payment. *Rogers v. West*, 9 Ind. 400. The jury, to be sure, might have so found, had the question been left to them. But the charge took from them all consideration of that question, and under it the jury, having found for the plaintiff on the paragraph, had nothing to do but compute the interest from the date of the sale.

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The charge should have been so framed as to have directed the jury, in case they found for the plaintiff on the paragraph, to allow interest for such time, if any, as they should find the money was withheld by unreasonable delay of payment.

But perhaps any injury which the appellant may have suffered, in consequence of the error in the charge, may be obviated.

It was in evidence, that, on the 10th day of February, 1874, the deceased married another woman, and thereby put it out of his power to comply with his contract with the plaintiff; and, from that time until the death of the deceased, the plaintiff seems to have been making unsuccessful efforts to procure a settlement with the deceased, and payment for the goods. We think, that, from that time forward, at least, payment for the goods was withheld by unreasonable delay, and have no doubt the jury would have so found under proper instructions, and have computed interest accordingly, even if they had not allowed interest from the time of the sale of the goods. In other words, we do not think the appellant could have been injured by the error in the charge of the court, beyond the amount of interest on the claim from the date of the sale of the goods up to January 10th, 1874.

The judgment below was rendered on the 20th day of September, 1877.

The interest on the five thousand dollars from January 10th, 1874, to September 20th, 1877, is one thousand one hundred and eight dollars and thirty-three cents, making, with the principal, six thousand one hundred and eight dollars and thirty-three cents.

The amount due on the note specified in the fourth paragraph, at the date of the judgment, including the interest, was seven hundred and sixty dollars and forty cents. This added to the sum, before mentioned, of six thousand

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one hundred and eight dollars and thirty-three cents, makes the sum of six thousand eight hundred and sixty-eight dollars and seventy-three cents (\$6,868.73).

We have concluded, that, for the last named sum, the judgment below ought to be affirmed, if the amount of the judgment below in excess of that sum shall be remitted as of the date of the judgment below. Otherwise the judgment below will have to be reversed.

It is therefore ordered, that the judgment below, for the sum of six thousand eight hundred and sixty-eight dollars and seventy-three cents, be affirmed, at the costs of the appellee, if, within sixty days, she shall enter a *re-mittitur* for the excess of the judgment above that sum, as of the date of the judgment below. Otherwise it is ordered that the judgment below be reversed, at the costs of the appellee.

Opinion filed at November Term, 1878.

Petition for a rehearing overruled at May Term, 1879.

FRYBERGER v. PERKINS.

SUPREME COURT.—*Record.*—*Affidavit.*—*Newly-Discovered Evidence.*—*New Trial.*—*Bill of Exceptions.*—*Practice.*—Affidavits, in support of a motion for a new trial on the ground of newly-discovered evidence, form no part of the record on appeal to the Supreme Court, unless embodied in a bill of exceptions.

SAME.—*Evidence.*—No question is presented to the Supreme Court on the overruling of such motion, where the evidence given on the trial of the cause is not in the record.

From the Madison Circuit Court.

D. C. Chipman, M. Chipman and W. Garver, for appellant.

Fryberger v Perkins.

Howk, J.—This was a suit by the appellant, against the appellee, to recover damages for an alleged assault and battery.

The action was commenced in the Hamilton Circuit Court, but, on the appellee's application, the venue of the cause was changed to the court below. The cause was put at issue, and submitted to a jury for trial, and a verdict was returned for the appellant, assessing his damages in the sum of one cent. Upon this verdict the court rendered judgment in favor of the appellant, for the sum of one cent in damages, and for "the sum of one cent costs, and no more." The appellant's motion for a new trial was overruled, and to this ruling he excepted. He has appealed to this court, and has assigned, as error, the overruling of his motion for a new trial.

One of the causes assigned for a new trial was newly-discovered evidence. The only point made by the appellant's counsel, in their brief of this case, is, that the affidavits filed in support of this cause for a new trial, "disclose a state of facts requiring a new trial." These affidavits were not made part of the record by a bill of exceptions, and therefore can not be considered. But, if the affidavits were properly before us, the evidence on the trial is not in the record; and, in the absence of this evidence, it would be impossible for us to know what bearing, if any, the newly-discovered evidence would or ought to have on another trial of the case.

We can not say from the record, that the court erred in overruling the appellant's motion for a new trial; and therefore we are bound to presume that it did not err in such ruling. *Myers v. Murphy*, 60 Ind. 282.

The judgment is affirmed, at the appellant's costs.

Reed *et al.* v. The Tioga Manufacturing Company.

REED ET AL. v. THE TIOGA MANUFACTURING COMPANY.

VENDOR AND PURCHASER.—*Fraudulent Representations.*—*Promissory Note and Mortgage.*—*Injunction.*—*Rescission.*—False and fraudulent representations that the title is good and unencumbered, made by the grantor to the grantee of real estate conveyed by a warranty deed, are grounds sufficient for a counter-claim to enjoin personal judgment against the grantee, in an action against him, by an assignee, on a promissory note not payable in bank, and to foreclose a mortgage on such real estate, executed by the grantee to the grantor to secure the payment of the purchase-money for the same.

From the Kosciusko Circuit Court.

C. Clemans, for appellants.

W. S. Marshall, J. M. Coombs, J. Morris and R. C. Bell,
for appellee.

PERKINS, J.—Stephen Reed executed to Watson C. Conant a mortgage, of which the following is a copy :

“This indenture witnesseth : that I, Stephen Reed, of Kosciusko county, in the State of Indiana, mortgage and warrant to Watson C. Conant, of Kosciusko county, in the State of Indiana, the following real estate, situate in Kosciusko county, in the State of Indiana, to wit: Commencing twenty-four rods north of the south-east corner of the south-west quarter of the north-west quarter of section twenty-seven, township thirty-two north, range seven east ; thence north, on the east line of said quarter, thirty-seven rods and three links, to the south line of Tra Ryerson's Addition to the town of Pierceton ; thence west with said line twenty rods ; thence south thirty-seven rods and three links ; thence east, twenty rods, to the place of beginning ; containing four and sixty-four hundredths acres, except a strip of land, four by ten rods, out of the north-east corner of said described land ; also a strip of land four by ten rods, south of out-lot four, block one, in Ryerson's Addition to Pierceton, in section twenty-seven, town thirty-two, range seven east, containing twenty-

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five hundredths acre, to secure the payment, when the same shall become due, of four promissory notes, of five hundred dollars each, said notes bearing even date with this instrument; the first due in five, the second in eleven, the third in seventeen, and the fourth due in twenty-four months from date; said notes marked 'Mortgage notes.' And the mortgagor expressly agrees to pay the sum of money above mentioned, without relief from valuation laws.

(Signed,)

"STEPHEN REED."

The mortgage was duly executed, acknowledged and recorded.

The mortgage and notes were transferred by Conant, the payee, to the Tioga Manufacturing Company, of Big Rapids, Mecosta county, Michigan, for the alleged consideration of two thousand dollars paid. They were not payable at a bank, but at the town of Pierceton, which is in Indiana.

This was a suit by said Tioga Manufacturing Company, assignee as aforesaid, to foreclose said mortgage. Copies of the mortgage and notes were made part of the complaint. The complaint was not attacked by motion, on account of any defect. Reed and Conant were both made defendants to the suit.

Afterward, on the 20th of October, 1874, the defendant Reed filed a demurrer to the complaint, assigning for causes:

1. That the plaintiff had no legal capacity to sue;
2. That the complaint did not state a cause of action.

The demurrer was overruled, and exception entered.

In compliance with a rule to answer, Reed then filed two paragraphs, which were counter-claims.

1. That the mortgage and notes in the complaint described were given to secure the purchase-money of certain real estate described in said paragraph of answer, and

appearing to be identical with that described in the mortgage, for the foreclosure of which this suit was instituted; that Conant, the mortgagee in said mortgage, made a deed to said described lands, with full covenants of warranty, without exception, which conveyance was the consideration for the notes mentioned in said mortgage; that said notes and mortgage were obtained by fraudulent representations of a good and unencumbered title to the land, the purchase-money of which they were given to secure, and said covenants of warranty. We quote from said paragraph of answer :

“And the said Conant, at the time he made said deed to the defendant, falsely and fraudulently represented, that there were no liens and encumbrances upon the said real estate, and that he had a good and valid title to the same; and the defendant made the purchase on the faith of said representations; that they were false; that said Conant knew they were false,” etc.

The paragraph proceeds to point out defects in the title, and gives a long list of judgments which were encumbrances upon the title, and which, it is averred, exceed in amount the value of the land. The paragraph of answer shows, that, as to a large portion of the land, Conant had no title whatever, he having purchased it at sheriff's sale, as the property of one Murray, since deceased, leaving him surviving, his wife, Delila A. Murray, who became the owner in fee of one-third of said land purchased at said sheriff's sale, etc.

The paragraph avers, that the consideration of the notes secured by the mortgage has failed; that defendant had offered to rescind the contract; that Conant has become a non-resident of the State, etc., and insolvent.

“Wherefore the defendant prays judgment, that the contract of said sale be decreed null and void against the defendant, and that the plaintiff be allowed only a fore-

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closure of the mortgage, but no judgment over on the notes, and for other relief, etc. ; substantially an injunction upon the collection of the notes.

In the second paragraph he set out the same facts, and prays an injunction.

The paragraphs were not attacked for any defects, by motion.

The answer contained much surplusage, but this did not vitiate it, only marred it. The answer made a case for an injunction.

Recovery by the appellee. Errors are duly assigned.

We think the court erred in sustaining demurrers to these paragraphs of counter-claims. *Fitch v. Polke*, 7 Blackf. 564 ; *Colson v. Smith*, 9 Ind. 8.

Had the suit been brought by Conant, the payee of the notes and mortgage, the case would have fallen directly within that of *Hinkle v. Margerum*, 50 Ind. 240. See *Norris v. Tharp*, 65 Ind. 47.

As the notes and mortgage in this case were not payable at a bank in this State, the same remedy against their collection may be had against the assignee, that might have been had against the payee.

According to the cases cited, the appellant Reed had an election of remedies. He might have sued for rescission, in proper time, or for damages occasioned by the fraud, or for an injunction till the title was perfected, or on the warrant of covenants.

The judgment is reversed, with costs, and cause remanded for further proceedings in accordance with this opinion.

Opinion filed at November Term, 1878.

Petition for a rehearing overruled at May Term, 1879.

TODD ET AL. v. FENTON ET AL.

PRACTICE.—Special Verdict.—Interrogatories to Jury.—A special verdict of a jury is different from their finding upon particular questions of fact stated in writing.

SAME.—A special verdict is never found by a jury when they return a general verdict.

SAME.—A jury finds specially upon particular questions of fact stated in writing, only when they render a general verdict.

SAME.—Will.—Contesting Validity of.—Fraud.—Duress.—Insanity.—Undue Influence.—Undue Execution.—In an action to contest the validity of a will, wherein the complaint alleged unsoundness of mind, undue execution, duress, fraud and undue influence, the defendants asked leave to submit an interrogatory to the jury, asking them whether the testatrix, when she signed the will, had "mind and memory sufficient to understand the ordinary affairs of life, and to act with discretion therein," whether she knew "her children and grandchildren," and whether she had "a general knowledge of the estate of which she was possessed; but the court refused to submit the same, and substituted interrogatories asking whether the testatrix, when she signed the will, was of sound mind, whether she was then under duress, and whether the will was duly executed or was obtained by fraud, etc.

Held, that the interrogatories substituted covered only the general issues embraced in the general verdict, and that the interrogatory propounded by the defendants should have been submitted.

SAME.—Instructions.—Declarations of Testator.—The defendants in such action having asked the giving of an instruction to the jury, properly stating the effect to be given by them, in determining the alleged unsoundness of mind, to declarations made by the testatrix at specified times before and after signing the will, and stating, also, that these declarations had no tendency to prove either fraud, duress or undue influence, the court added the words "Unless they were made at the time, and became a part of the *res gestæ*," and then gave the instruction.

Held, that the addition was erroneous.

SAME.—Undue Influence.—The court also instructed the jury in such case, that, if one or more of the beneficiaries of the will, in the capacity of an agent of the testatrix, by means of such agency or otherwise, exercised "a controlling influence over her conduct, interests and will, prior to and at the date of said will, and that said will excludes the plaintiffs from participating in her estate, when they might otherwise have been subjects of her bounty, then you may find that such will is not her will, but void on account of undue influence."

Held, that the instruction was erroneous.

66	25
132	535
66	25
132	8
66	25
142	206
66	25
144	489
145	106
146	399
66	25
152	277
66	25
155	361

Todd et al. v. Fenton et al.

From the Jefferson Circuit Court.

C. A. Korbly, for appellants.

J. W. Gordon, R. N. Lamb, S. M. Shepard and E. R. Wilson, for appellees.

WORDEN, J.—This was an action by the appellees, against the appellants, to set aside the will of Elizabeth Todd, deceased.

The will had been admitted to probate, and letters testamentary had been issued to the executor named therein.

The grounds of the contest are thus stated in the complaint: "They" (the plaintiffs) "further aver, that said Elizabeth Todd, deceased, at the time she executed said pretended will, was of unsound mind, and wholly incapable of executing a will by reason of unsoundness of mind. Further, that said supposed will was and is invalid, because the same was unduly executed, and that the same was executed by said Elizabeth Todd, deceased, under duress, and was obtained by fraud and undue influence."

The defendants answered by general denial, and the cause was tried by a jury, who found a general verdict for the plaintiffs. Judgment accordingly.

The defendants prepared, and at the proper time asked the court to require the jury to answer, certain interrogatories in case they should find a general verdict, but the court refused to require the jury to answer the same or either of them, and substituted in the place thereof the following, which were answered by the jury, as set out:

"1st. Was Elizabeth Todd of sound mind, at the date of the execution of the paper writing in contest, namely, on the 19th day of July, 1869?

"Ans. She was of unsound mind.

"2d. Was the paper writing duly executed?

"Ans. It was duly executed.

"3d. Was Elizabeth Todd under duress, at the time she signed the paper writing?

" Ans. She was not.

" 4th. Was said paper writing procured to be made by said Elizabeth Todd, by fraud ?

" Ans. It was.

" 5th. Was said paper writing procured to be made by said Elizabeth Todd, by undue influence ? If so, by whom ?

" Ans. It was ; by Joseph Todd and I. N. Todd."

The grounds, as we have seen, upon which the supposed will was contested, were, as named in the complaint :

1. Unsoundness of mind ;
2. Undue execution ;
3. Duress ;
4. Fraud ; and,
5. Undue influence.

It will be seen that the interrogatories propounded sought only general answers, responsive to the issues joined on each of the grounds of contest. They were no more particular than if the court had directed the jury to say whether they found for the plaintiffs or the defendants, on each of the several grounds of contest, except the fifth, which directed them, if they should find the undue influence, to say by whom it was exerted. Suppose, that, instead of setting up all the grounds of contest in one paragraph, the complaint had contained as many paragraphs as there were grounds of contest, each setting forth one of the grounds. The interrogatories, except the last portion of the fifth, would be no more particular than a direction to the jury to specify whether they found for the plaintiffs, or for the defendants, on each of the paragraphs. To state the matter a little differently, the effect of the interrogatories was simply to require the jury to specify whether or not each of the several grounds of contest was made out.

Take the first interrogatory as an illustration of the others : " Was Elizabeth Todd of sound mind, at the date of the execution of the paper writing in contest, namely, on the 19th day of July, 1869 ? "

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An answer to this could be nothing more than to say, that the first ground of contest was, or was not, made out; in other words, an answer to the question could be nothing more than saying that the jury found for the plaintiffs, or for the defendants, as to the first ground of contest. And so of the residue of the interrogatories. This is no more particular than would be a direction to a jury, where there was a complaint containing several paragraphs, to specify in their verdict whether they found for the plaintiffs, or for the defendants, on each of the paragraphs.

The statute provides that "In all actions the jury, unless otherwise directed by the court, may in their discretion render a general or special verdict; but the court shall, at the request of either party, direct them to give a special verdict in writing upon all or any of the issues; and in all cases, when requested by either party, shall instruct them, if they render a general verdict, to find specially upon particular questions of fact to be stated in writing. The special finding is to be recorded with the verdict." 2 R. S. 1876, p. 171, sec. 336.

The next following section of the statute provides, that, "When the special finding of the facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."

A special verdict is not to be confounded with the finding of the jury "upon particular questions of fact to be stated in writing."

Where there is a special, there is no general verdict; and the jury may be required "to find specially upon particular questions of fact," only in cases where they render a general verdict.

It seems clear to us, the parties had a right to propound to the jury, to be answered by them in case they should find a general verdict, questions of fact of a more

particular character than those submitted by the court, which, as has been seen, only sought to elicit from the jury responses as to whether or not each of the grounds of contest was made out. These were general and not particular questions of fact. Each question involved the entire issue upon the particular ground of contest to which it related.

It was held by this court, in the case of *Morse v. Morse*, 25 Ind. 156, 161, that the statute "obviously means that a party may require the jury to return a special answer to single questions of fact, pertinent to and involved in the issue, tending to support or defeat it, and which would be impliedly covered by a general verdict. And the office of such special findings is that if, under the law, the particular facts so found are inconsistent with the general verdict, the former shall control the latter."

See, also, *Manning v. Gasharie*, 27 Ind. 399, 409, where the same thing is repeated, and it is held that "By 'particular questions of fact' something less than an issue presented in the case is intended."

The interrogatories propounded by the court can not, therefore, be held to have been properly substituted for those which the appellants asked to have propounded to the jury; and the latter, if correct, should have been submitted.

We need not pass upon all the questions which the appellants asked to have propounded, as they asked to have all and each of them submitted, to be answered if the jury should find a general verdict.

The appellants' eighth interrogatory was as follows:

"At the time said Elizabeth Todd signed said will, did she have mind and memory sufficient to understand the ordinary affairs of life, and to act with discretion therein? Did she know her children and grandchildren, and have a general knowledge of the estate of which she was possessed?"

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This question, we think, should have been propounded. It was pertinent to the issue on the question of sanity. It was sufficiently single. Did the supposed testatrix have sufficient mind and memory to understand and know and act as stated in the question? It sums up very fairly the mental capacity necessary to make a will. It admits of a direct affirmative or negative answer. If answered in the affirmative, it would show sufficient mental capacity to make a will, and such answer would control the answer given to the first interrogatory propounded, which we can not regard as any thing more than a general finding upon the issue of sanity.

It is objected by the appellees, that the question rested "on an assumed fact." We see no assumption in the question, except that Elizabeth Todd signed the will. This the appellants have the right to assume, because it was fully conceded that she signed it, in the complaint, in setting forth the grounds of contest. Again, it is objected that the question was directed to matters of evidence, and fell short of any material fact in the case. It was directed to matters of fact concerning which evidence had been given, and not to matters of evidence; and in our opinion it did not fall short of any material fact in the case. If the testatrix had mind and memory sufficient to understand the ordinary affairs of life, and to act with discretion therein, to know her children and grandchildren, and to have a general knowledge of the estate of which she was possessed, she had sufficient capacity to make a will.

In *Rush v. Megee*, 36 Ind. 69, an instruction was held to be correct which charged the jury, that, "In legal contemplation, one who has sufficient mind to know and understand the business in which he is engaged, who has sufficient mental capacity to enable him to know the extent of his estate, the persons who would naturally be supposed to be the objects of his bounty, and who could keep these in his

mind long enough to, and could, form a rational judgment in relation to them, is a person of sound mind." See, also, *Bundy v. McKnight*, 48 Ind. 502; *Thompson v. Kyner*, 65 Pa. State, 368.

This view in no manner conflicts with the case of *Eggers v. Eggers*, 57 Ind. 461, in which it was held that partial insanity incapacitates one to make a will, and that the phrase "unsound mind" includes idiots, *non compos*, lunatics, distracted persons and monomaniacs. But the case does not decide what degree of mental weakness or aberration will bring a person within either of those categories. The court remarked: "It is often difficult to decide when eccentricity, or a merely capricious imagination, terminates, and when actual mental derangement begins; but when a person has become the victim of a mental derangement, amounting to insanity in any form, we are of the opinion, that, under our statute, he is incompetent to make a will."

We are of opinion that the court erred in refusing to propound the interrogatory to the jury.

We proceed to the consideration of other questions in the cause.

The appellants asked, and the court gave, the following charge:

"No. 35. If you find from the evidence that Elizabeth Todd, the deceased, from five to ten days before the will was made, made statements to John Pattie in respect to Joseph Todd having teased her to make a will, and that she made statements, a week after the will was executed, to the witness, Mrs. Temperly, to the effect that she was very sorry that she had made a will, and that Joseph and Newton Todd had asked or solicited her to make a will, you have a right to consider these statements in deciding upon the soundness of Mrs. Todd's mind at the time she signed the will; but you can not consider these statements

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upon the other issues in the case ; they have no tendency whatever to prove fraud, duress or undue influence, or that Joseph or any of said children made such statements." But the court added to the charge the following words : " Unless they were made at the time, and became a part of the *res gestæ*."

The proposition embodied in the charge as asked is settled law. While the statements made by a testator before, or after, or contemporaneously with, the execution of a will, may be competent as tending to show his mental condition at the time of its execution, statements made by him not contemporaneously with its execution are not competent to prove fraud, undue influence, etc. *Hayes v. West*, 37 Ind. 21.

The charge as asked should have been given, and the court clearly erred in adding the appended words. The words added could but lead to confusion and uncertainty, and were of such character as to be likely to mislead the jury.

The time referred to in the words added by the court must have been the time of the execution of the will. The charge as asked had no reference to statements of the testatrix, made at the time of its execution. It specifically and pointedly referred to a time from five to ten days prior to its execution, and to a time a week after its execution.

The effect of the words added was to say to the jury, that, if the statements thus referred to as made so long before and so long after the will was executed were made at the time of its execution, and became therefore a part of the *res gestæ*, they might be considered upon the questions of fraud, undue influence, etc.

The jury might well have inferred from what was added by the court, that, in its opinion, as matter of law, the times specified in the charge might be regarded as the time of the execution of the will, and, therefore, what was

said at those times by the testatrix might be a part of the *res gestæ*.

The court gave the following charge at the instance of the plaintiffs :

" 19. If you shall believe from the evidence, that one or more of the beneficiaries of the will in contest acted as agents of the testatrix, from the death of her husband to the date of said will and afterward, and that they exercised, by means of such agency or otherwise, a controlling influence over her conduct, interests and will, prior to and at the date of said will, and that said will excludes the plaintiffs from participating in her estate, when they might otherwise have been the subjects of her bounty, then you may find that such will is not her will, but void on account of undue influence."

It may be remarked that the plaintiffs were the grandchildren and a great-grandchild of the testatrix, and took nothing under the will, they being the descendants of a daughter of the testatrix, who was dead; and the property of the testatrix was devised or bequeathed to her surviving children.

We think the charge as given was erroneous. In it the court said to the jury, that, if the beneficiaries under the will exercised a *controlling* influence over the conduct, interests and will of the testatrix prior to and at the date of the will, and that the will excludes the plaintiffs from participating in her estate when they might otherwise have been the subjects of her bounty, they might find the will void on the ground of undue influence.

It will be seen that, in the charge, the controlling influence hypothesized is in no manner connected with the making of the will. It is not said that if the will was procured to be made by such influence, or procured to be made as it was made by such influence, it might be held void; but that if the beneficiaries exercised such influence

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over the conduct, interests and will of the testatrix, it might be held void. The word "will," as thus used, was evidently used in the sense of volition, and not in that of a testament. It is not perceived how the controlling influence thus exercised could invalidate the will, unless it was exercised in procuring it to be made, or in procuring it to be made as it was made, even though the plaintiffs might otherwise have been the recipients of bounty of the testatrix. The controlling influence which one person may exercise over another can not destroy the testament of the latter, unless it was exercised in some way in connection with the testament.

But the charge is open to another fatal objection. Mere *controlling* influence is not sufficient to invalidate a will; and it matters not whether the parties exercising the influence stood in the relation of agents to the testatrix or otherwise. The fact of such relationship may, to be sure, be a circumstance to be considered with other matters in determining the extent of the influence exerted, but it is of no further importance.

The phrase "controlling influence" is, in common parlance, of very indefinite signification. If the influence control at all, whether it be in a very great or a very slight degree, it is still a controlling influence. Influence may control in a greater or less degree. In *Rabb v. Graham*, 43 Ind. 1, 12, it was said by this court, that "The amount of undue influence which will be sufficient to invalidate a will must, of course, vary with the strength or weakness of the mind of the testator. The influence which would subdue and control a mind naturally weak, or one which had become impaired by age, sickness, disease, intemperance, or any other cause, might have no effect to overcome or mislead one naturally strong and unimpaired. But in every case the influence that will vitiate a will must be such as, in some degree, to destroy the free agency of the

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testator and constrain him to do what is against his will, but what he is unable to refuse, or too weak to resist."

The charge did not give to the jury a correct statement of the law as to the extent and character of such undue influence as will vitiate a will.

Some other questions are made, both in regard to other instructions and to evidence; but we think we need not pursue the case further, as the same questions may not arise on another trial of the cause.

For the errors already considered, the judgment below will have to be reversed.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

Opinion filed at November Term, 1878.

Petition for a rehearing overruled at May Term, 1879.

KIMMEL ET AL. v. COMMONS ET AL.

PAYMENT.—*Principal and Agent.*—*Harmless Ruling on Demurrer.*—Where there is an answer of payment generally, as well as an answer of payment to a particular third person, alleged to have been authorized to receive it, the facts alleged in the latter are admissible under the former, and therefore the overruling of a demurrer to the latter is harmless.

BILL OF PARTICULARS.—*Measure of Damages.*—*Instruction.*—*Evidence.*—*Supreme Court.*—In an action on account, wherein one paragraph purported to set out a bill of particulars, and a second alleged that the plaintiffs were not able to furnish a bill of particulars, though the bill of particulars filed corresponded better with the latter than the former, the court instructed the jury that they could "not allow the plaintiffs for any item not included in the bill of particulars."

Held, the evidence not being in the record, that the Supreme Court can not say that the instruction was erroneous.

From the Wayne Circuit Court.

H. C. Fox, for appellants.

T. J. Study, for appellees.

Kimmel et al. v. Commons et al.

PERKINS, J.—Suit on an account.

The complaint contained two paragraphs, and one bill of particulars.

Answer in four paragraphs:

1. In general denial;
2. Payment;
3. Payment to a particular person not a party to the suit, but who was authorized to receive payment; and,
4. A set-off, accompanied by a bill of particulars, amounting to three hundred and forty-eight dollars and seventy-three cents.

A demurrer to the third paragraph of answer was overruled, and exception entered.

Reply in denial of the second, third and fourth paragraphs of answer.

Trial by jury; verdict for the plaintiff, for twenty-three dollars; judgment for that sum, against the defendants, but the costs were taxed to the plaintiffs, to which taxation they excepted.

Plaintiffs moved for a new trial, which motion was overruled. They filed a bill of exceptions, and appealed to this court.

They assign as errors:

1. Overruling the demurrer to the third paragraph of answer;
2. Overruling the demurrer to the fourth paragraph of answer; and,
3. Overruling the motion for a new trial.

We consider, and decide upon, the errors assigned.

The first is not insisted upon in argument, and is therefore waived. But, as there was a general paragraph of answer of payment in the record, the payment alleged in the third paragraph might have been proved under said paragraph of payment, generally. The ruling on the third paragraph was therefore harmless.

The second error assigned does not appear by the record to have occurred, as the record does not show the filing of a demurrer to the fourth paragraph of answer.

Counsel, in his brief for appellant, says:

"The error principally complained of in this case, and relied upon for a reversal thereof, was the giving of charge No. eight (8), given to the jury by the court."

That was as follows:

"The jury can not allow plaintiffs for any work or item not included in their bill of particulars."

This instruction is included in a bill of exceptions signed by the court, which states that it was objected to at the time as not expressing the law; and, by statute, "An exception is an objection taken to a decision of the court upon a matter of law." 2 R. S. 1876, p. 175, sec. 342.

The exception to the instruction was properly reserved. To correctly appreciate the objection to this instruction, it will be necessary that we have before us a brief statement of facts.

The complaint, as we have stated, consisted of two paragraphs. The gravamen of the first was, that the defendants, as partners, "were indebted to the plaintiffs in the sum of two hundred and fifty dollars, for work and labor done for defendants, at their request, a bill of particulars of which is herewith filed," etc.

The gravamen of the second paragraph was, that the defendants, as partners, were "indebted to the plaintiffs, for work and labor and for the use of horses and wagons, done and furnished for the defendants by the plaintiffs, at defendants' request," etc.; and the paragraph averred, that the plaintiffs were not able to furnish a bill of particulars, etc.

Each paragraph claimed two hundred and fifty dollars.

No bill of particulars appears to have been filed with either paragraph of the original complaint; but, accord-

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ing to the clerical entries, the plaintiffs, on the third day of the April term, 1875, filed an amended complaint, containing the two paragraphs from which we have quoted, and, says the record, "on motion, the defendants are ruled to answer on or before the second Wednesday of this term; said plaintiffs now file their bill of particulars, in these words, to wit:" Here follows a bill of items, twenty-five in number, amounting in the aggregate, to three hundred and twenty-four dollars, being seventy-four dollars more than was claimed in either paragraph of the complaint," most of which items are for hauling with teams, of which we give a few examples:

"To one day, with four horses.....	\$6.00
"To two days, with four horses	12.00
"To lumber, to Connersville.....	5.00
"To timber, from Thos. Houston	28.75
"Use of team, hauling to Connersville	10.50 "

The bill of particulars better corresponded with the allegations of the second, than with the first, paragraph of the complaint, though portions of it, if not all, would have been admissible under each.

The evidence is not in the record.

The appellants contend, that the bill of particulars was under the first paragraph of complaint only, and limited the proof under it; but that, as there was no bill of particulars under the second paragraph, they had a right to prove any item under it, that might properly have been stated in a bill of particulars, could one have been furnished.

In the absence of the evidence given in the cause, we can not say, under the circumstances surrounding this case, appearing by the record, that the plaintiffs were injured by the instruction, even if it were erroneous as an abstract proposition, a point we need not now decide.

The judgment is affirmed, with costs.

WENTWORTH ET AL. v. ALEXANDER.

HABEAS CORPUS.—Void Verdict.—Murder in Second Degree.—Criminal Law.—Once in Jeopardy.—Acquittal.—A joint petition against a sheriff, by two persons, for a writ of *habeas corpus*, recited that the petitioners had been jointly tried in the circuit court, on a joint indictment for murder in the second degree; that the jury had returned a verdict finding them guilty as charged, and fixing their punishment at imprisonment in the state-prison for two years; that the jury had been discharged by the court, after a statement by the defendants that they had motions to make and waived none of their rights; that the court had denied the defendants' motion to be discharged, but had granted them a *venire de novo*; that the court continued the cause until the next term of court, ordering them to be recognized to appear at that term; and that the defendants, having failed to give bond, were taken into custody by the sheriff.

Held, on the petition, and on a return by the sheriff, showing the same facts, that the writ will not lie.

Held, also, BIDDLE, J., dissenting, (the statutory punishment for murder in the second degree being imprisonment for life,) that the verdict was void, but that the defendants had been once in jeopardy and can not be tried again.

From the Monroe Circuit Court.

F. Wilson, J. W. Buskirk, H. C. Duncan, R. W. Miers and *C. F. McNutt*, for appellants.

J. R. East, for appellee.

BIDDLE, J.—Petition by the appellants, for a writ of *habeas corpus*, against the appellee, sheriff of Monroe county.

The petition states the following facts:

That the plaintiffs are restrained of their liberty by the defendant; that the cause of such restraint is, that, at the January term of the Monroe Circuit Court, 1879, the defendants were indicted for murder in the second degree, alleged to have been committed in killing James H. Rodgers; that they were tried on said indictment, at said term, by a jury; that the jury returned a verdict upon said trial, in the following words:

“We, the jury, find the defendants guilty as charged in

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139	274
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144	650
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Wentworth *et al.* v. Alexander.

the indictment, and assess their punishment at imprisonment in the state-prison for two years."

Upon return of the verdict, the court asked the defendants if they had any objections to make to the form of the verdict, to which question by the court the defendants answered: "That they had motions which they intended to make, and did not desire to waive any of their legal rights." Whereupon the court received the verdict, and discharged the jury.

Afterward, at said term, the defendants moved the court to be discharged from said indictment. Their motion was overruled, and the defendants excepted. Thereupon the defendants moved the court for a *venire de novo*. Their motion was sustained, and the State excepted. That the court continued said case until the next term, and ordered the defendants to enter into bond in the sum of five thousand dollars each, for their appearance at the next term of the court, to answer the charge in said indictment; that the defendants, on failing to give said bond, were taken into custody, under said order, by the sheriff, as aforesaid, and still remain in custody; that said restraint is illegal, in this:

"1. That said indictment does not state facts constituting a public offence;

"2. That said appellants have been in jeopardy once under said indictment, and that the verdict returned by the jury is void."

Prayer for the writ of *habeas corpus*, and that they may be discharged.

The court granted the writ, to which the defendant, as sheriff, made return, setting out the indictment, and a transcript of the proceedings of the court, stating substantially the same facts as those alleged in the plaintiffs' petition. The sufficiency of the return was excepted to, and the exceptions overruled. The case was heard and

determined by the court, and the petitioners remanded to the custody of the sheriff. From this decision they appeal to this court. The petition for the writ and the return to the writ present the only question in the case for our consideration.

By our code, it is enacted, in reference to the writ of *habeas corpus*, as follows :

“ SEC. 725. No court or judge shall enquire into the legality of any judgment or process, whereby the party is in custody, or discharge him when the term of commitment has not expired in either of the cases following :

“ *First.* Upon process issued by any court or judge of the United States, where the court or judge has exclusive jurisdiction ; or,

“ *Second.* Upon any process issued on any final judgment of a court of competent jurisdiction ; or,

“ *Third.* For any contempt of any court, officer, or body having authority to commit ; but an order of commitment as for a contempt, upon proceedings to force the remedy of a party, is not included in any of the foregoing specifications.

“ *Fourth.* Upon a warrant issued from the circuit court, or court of common pleas, upon an indictment or information.”

It is clear, by the facts in this case, that the appellants are held in custody by the order of a court of competent jurisdiction, upon an indictment presented by a grand jury ; and we think it is just as clear, by the law, that the circuit court had no power to enquire, by a writ of *habeas corpus*, into the legality of the order under which they are committed. 2 R. S. 1876, p. 293.

In the case of *Wright v. The State*, 5 Ind. 290, which was upon a writ of *habeas corpus*, sued out before a judge of the court of common pleas, this court said, HOVEY, J., delivering the opinion of the court :

Wentworth *et al.* v. Alexander.

“The facts in this case show that the prisoner was in custody, awaiting his trial under an indictment for murder, and we are clearly of opinion that although the discharging of the jury by the circuit court was equivalent to a verdict of acquittal, yet as the case was not finally disposed of, and as there was no release of the prisoner by any judgment of the court, he must be regarded as in custody under the indictment. Had there really been a verdict of acquittal rendered by the jury, without further action by the circuit court, the judge of the court of common pleas could not have discharged him. If he could, at this stage of the case, why not at any other? Why not even take the case from the hands of the jury in the midst of their investigation? Such is not the object or true meaning of our act of *habeas corpus*.”

In the case of *Wright v. The State*, 7 Ind. 324, of the same name, yet a different appellant, the petitioner for a writ of *habeas corpus* had been indicted and tried for murder, but the jury returned a verdict of guilty of an assault and battery, and assessed a fine against him as the punishment. The court held the verdict to be a nullity; yet, under the section we have quoted above, also held that the petitioner could not be discharged on *habeas corpus*, the court remarking, that, “While the case is still pending in the Johnson Circuit Court, we have no jurisdiction.”

Indeed, should it be conceded in the present case, as a majority of the court think it must be, that the appellants had been once put in jeopardy for the offence, that the verdict was a nullity, that the appellants had waived no legal right in the case, and that they were entitled to their discharge in the court below, yet they can not be discharged on a writ of *habeas corpus*, while that indictment is pending, and they are committed to custody by the order of the court under it, to answer to the charge therein contained.

The Louisville, New Albany and Chicago R. W. Co. v. Richardson.

But, in the opinion of the writer, as the circuit court had no power, this court, under a writ of *habeas corpus*, has no power, upon appeal, to enquire into the legality of the order of commitment in this case. It is not our duty to express any opinion on its merits; indeed, it is our duty not to express an opinion upon the merits of any case over which we have no jurisdiction, and which is not properly before us for adjudication. Doubtless, on further proceedings upon the indictment in the court below, the rights of the appellants and the State will be properly adjudged; if they think not, an appeal from a final judgment in that court will lie to this, and thus the merits of the facts alleged in the petition and averred in the return to the writ may be brought properly before us for our adjudication.

No point was made upon the question of joining two parties as plaintiffs in a writ of *habeas corpus*; this court, therefore, expresses no opinion upon the question.

The judgment is affirmed, at the costs of the appellants.

Opinion filed at November Term, 1878.

Petition for a rehearing overruled at May Term, 1879.

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127	57
66	43
132	341

THE LOUISVILLE, NEW ALBANY AND CHICAGO R. W. Co. v.
RICHARDSON.

NEGLECT.—*Property Burned by Sparks from Locomotive.*—*Act contributing to Injury.*—*Contributory Negligence.*—*Answers to Interrogatories.*—In an action against a railroad company, by the owner of real estate lying contiguous to the defendant's track, to recover damages for the burning of a house situated on such real estate and of personal property contained therein, belonging to him, alleged to have been caused by sparks escaping from the smoke-stack of a locomotive used by the defendant, which was not provided with a sufficient spark arrester, the jury, with their general verdict for the plaintiff, found specially, that the plaintiff's house was set on fire by sparks emitted from the smoke-stack of a locomotive which was pro-

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vided with an improper, defective and unsafe spark-arrester : that, if the locomotive had had a proper spark-arrester, the burning could not have occurred ; that the sparks entered an unoccupied upper room of the house, through a window fronting on the track, left open by the plaintiff ; and that, though the opening of the window contributed to the burning, yet, as the plaintiff did not know of the use or presence of the defective locomotive, he was not guilty of negligence in leaving the window open.

Held, that the defendant was not entitled to judgment *non obstante*.

SAME.—*Instruction.*—*Jury to find as to Negligence.*—The evidence being conflicting, it was proper to instruct the jury trying such cause, that the court left it to them, "as a question of fact, whether there was negligence in the plaintiff, that invited or contributed to the injury complained of."

SAME.—*Evidence.*—It was competent to enquire of a witness the exact date, after the fire, when such locomotive was taken to the shop to be repaired, to ascertain the correctness of a previous statement by him as to such date.

SAME.—*Declarations of Plaintiff's Husband.*—*Agency.*—Statements by the plaintiff's husband, as to the origin of the fire, were not competent evidence against the plaintiff, without proof of his agency.

SAME.—*Impeachment of Witness.*—*Residence.*—A witness may be impeached by evidence of his reputation for truthfulness in a neighborhood where he had resided until a time six weeks prior to the time when he testifies.

From the Lawrence Circuit Court.

T. J. Jackson, for appellant.

G. Putnam, G. W. Friedley, W. H. Edwards, J. W. Buskirk and H. C. Duncan, for appellee.

PERKINS, J.—Suit by the appellee, against the appellant, to recover damages she sustained by the burning of her house and some personal property, through the negligence of the appellant in running its locomotive along and upon its railroad tracks, using at the time imperfect, improper and inefficient spark-arresters in and over the smoke-stack of said locomotive, etc.

The paragraphs of complaint were sufficient. They severally, sufficiently charged the negligence of the appellant, the injury done, and alleged that it happened without the fault of the appellee, etc. *Clark v. The Jeffersonville, etc., R. R. Co.*, 44 Ind. 248 ; *The Terre Haute, etc., R. R. Co. v. Graham*, 46 Ind. 289 ; *The City of Fort Wayne v. De Witt*, 47 Ind. 391.

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Answer, the general denial. Trial by jury. Verdict as follows:

"We, the jury, find for the plaintiff, and assess her damages at \$3,000—three thousand dollars."

The jury also returned answers to the following interrogatories, as follows:

"1st. Are you satisfied, by a preponderance of the evidence, that the house of the plaintiff was set on fire by defendant's locomotive known as the 'Tornado'?"

"Answer. Yes.

"2. Has it been proved to your satisfaction, and by a preponderance of the evidence, that said locomotive was not in a good condition, and its smoke-stack not properly guarded?"

"Ans. Yes.

"3. Is it proved that the defendant did not, at the time of the fire, use a suitable device for the arrest of sparks from the smoke-stack of her said engine?"

"Ans. Yes.

"4. Did the fire that burned plaintiff's house originate in the upper story, and in a room where one or more windows were left open on the end of the house next to the railroad, and while said locomotive was passing and re-passing on defendant's road?"

"Ans. Yes.

"5. Was there bedding in said room, and a bed or lounge immediately under a window, which window was left open by plaintiff at said time when the fire caught, and when defendant's locomotive was passing and switching?"

"Ans. Yes.

"6. Was said room occupied at the time?"

"Ans. No.

"7. Did the fact that the window was left open, at the time of the passing and switching of said engine, contribute to the injury complained of?"

- The Louisville, New Albany and Chicago R. W. Co. v. Richardson.

"Ans. Yes, but no negligence on the part of the plaintiff.

"How much of your verdict for damages, if any, for the loss of the 'Putnam House,' so-called? How much for personal property, if any? How much for stable, if any? How much for any other property, if any?

"Ans. We only find \$2,000 for 'Putnam House,' and \$1,000 for personal property therein, and nothing for any other property.

"9. Was the stable, wash and meat house, coal house, fences and walks of the plaintiff, or either of them, destroyed by the fire, by being fired directly from the sparks of the defendant's engine, or only by having caught from the main or Putnam House?

"Ans. Yes, all of them; we find that the property mentioned in this last interrogatory was burned, but not directly from the sparks of the defendant's engine, but from taking fire from the Putnam House."

After the verdict was returned, the appellant moved the court to render judgment in favor of the defendant upon the special findings of the jury, and assigned several reasons in support of his motion, but the court overruled the motion, and rendered judgment on the general verdict, to which the appellant excepted.

On appeal to this court, it is assigned for error:

1. That the court refused the motion to strike out parts and all of the paragraphs of the complaint;
2. To make the second paragraph of complaint more specific;
3. That the court overruled the several demurrers to the paragraphs of complaint;
4. That the court overruled the motion for judgment on the special findings;
5. That the court overruled the motion for a new trial;
6. That the court overruled the motion in arrest.

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The court committed no error in overruling motions touching, and demurrers to, the paragraphs of complaint.

The court committed no error in overruling the motion for judgment on the special findings, as they were not irreconcilably inconsistent with the general verdict; and the rule is that the "antagonism between them must be apparent upon the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issues, before the court can be called upon to give judgment against the party who has the general verdict in his favor."

The sparks or coals of fire by which the Putnam House was set on fire issued from the smoke-stack of the locomotive named the "Tornado."

This testimony was before the jury as to the condition of that smoke-stack :

"The smoke-stack was one of the oldest on the road. The netting was all cut away and rotted away round the rim, and holes punched in it. The smoke-stack was not fit for any thing; it was taken down and thrown away," not long after the fire. The netting spoken of was made of wire; and the netting is to prevent the throwing off or emission of sparks of fire. On the day the Putnam House was burned, the "Tornado" passed within forty or fifty feet of the house; the day was windy, and one witness testified that sparks issued from the smoke-stack of said locomotive as big as his little finger, and another that he saw some as large as his thumb. The testimony tended to show that a smoke-stack, provided with good netting, would not emit dangerous sparks. There was no evidence that the appellee had knowledge of the condition of the smoke-stack of the Tornado, nor that the engine was to be run on the road on the day of the fire, nor that it was to stop, or was stopping, for any length of time, in front of her said property.

Turning now to the answers to interrogatories :

The Louisville, New Albany and Chicago R. W. Co. v. Richardson.

The answer of the jury to the seventh interrogatory was, that "the fact that the windows were left open at the time of the passing and switching of said engine contributed to the injury complained of," but that there was "no negligence on the part of the plaintiff," appellee; that is, that the windows' being open contributed to or facilitated the injury, but that the leaving open of said windows did not constitute contributory negligence, and hence did not bar the right of recovery of the appellee. To illustrate. The idea is this: If the windows had been shut, and the road had shot fire-balls through them, thereby causing the burning of the house, the fact that the glass in the windows was not of sufficient strength to resist the fire-balls would have contributed, in a sense, to the firing of the house. Or if the sparks, as big as a man's thumb, had been driven against and through the windows when closed, the same would have been the fact. But contributions to the injury do not necessarily preclude the right to recover compensation for it. The contribution must be negligent. It is contributory negligence that bars the right of action for compensation.

We state, as a correct proposition of law, that it was not negligence in the appellee to leave her windows open, if the passing of locomotives or engines, with properly constructed and, at the time, properly guarded smoke-stacks, would not endanger her property, unless she had knowledge or notice of the coming of such as were dangerous. She would have a right to act upon the presumption that the company would do its duty, and run only engines with safe smoke-stacks. It is plain from the evidence that her property was not in danger from engines having properly constructed smoke-stacks, in proper condition, and that the appellee had no notice or knowledge of the approach of the "Tornado." Hence the jury were well justified in finding that there was no negligence on the

The Louisville, New Albany and Chicago R. W. Co. v. Richardson.

part of the appellee, a proposition which was involved in the general verdict.

We proceed to the question whether the court erred in overruling the motion for a new trial.

The verdict rendered was not contrary to law, and was sustained by evidence.

It was claimed in the motion that the court committed errors of law upon the trial :

1. In giving the latter part of instruction numbered fifteen, which was in these words, viz.: "Also, I leave it to you as a question of fact, whether there was negligence in the plaintiff, that invited or contributed to the injury complained of."

It is said in the elaborate case of *Gagg v. Vetter*, 41 Ind. 228: "The question of negligence is one of mingled law and fact, to be decided as a question of law by the court, when facts are undisputed or conclusively proved, but not to be withdrawn from the jury when the facts are disputed and the evidence is conflicting."

According to this rule the question of negligence in this case was correctly left to the jury, under proper instructions which had already been given in the cause to the jury.

2. Another ground alleged in the motion for a new trial was the refusal of the court to strike out of the deposition of Richard Crawford the following question and answer :

"You stated in answer to question forty-two, that the engine 'Tornado' was brought to the shop for repairs in the year 1853; was it in 1853 or 1873? Ans. In 1873."

We see no error in this.

3. Another ground alleged in the motion for a new trial was the denial by the court of the motion to strike out the 44th, 45th and 46th interrogatories and answers thereto in the deposition of Richard Crawford.

York v. Webster.

There was no error in this ruling. It is unnecessary to here copy said interrogatories and answers.

4. The court refused to hear proof of the admissions of James Richardson, the husband of the appellee, as to the origin of the fire. There was no error in this. He was not a party to the suit, had no interest in the property, and had no right to bind the owner by his declarations. He is not shown to have been her agent for that purpose, and the declarations were made after the event. *Bennett v. Holmes*, 32 Ind. 108.

No seventh interrogatory in the deposition of James H. Swan appears in said deposition, as contained in the bill of exceptions. The court, therefore, is not shown to have erred in refusing to strike it out.

The appellant offered to prove the general character of the deponent Richard Crawford, for truth in New Albany. He resided at Elizabethtown in Kentucky, at the time of the trial and at the time of taking his deposition, which was about six weeks prior to the trial, but up to that time he had lived in New Albany. The court refused to admit the proof, for the reason that the residence of deponent was then at Elizabethtown, in Kentucky. The court erred in this ruling. *Stratton v. The State*, 45 Ind. 468.

The judgment is reversed, with costs, and the cause remanded for a new trial.

YORK v. WEBSTER.

MALICIOUS PROSECUTION.—Evidence.—Delay.—Dismissal of Prosecution.—

In an action for damages for malicious prosecution, the jury may consider, as tending to support the action, evidence of delay by the defendant in instituting the prosecution complained of, delay in bringing it to a trial after its institution, and the dismissal of the prosecution without a trial.

York v. Webster.

SUPREME COURT.—*New Trial.—Evidence.*—The Supreme Court will not grant a new trial merely because of the weakness of evidence tending to support the verdict.

From the Dearborn Circuit Court.

H. D. McMullen and *D. T. Downey*, for appellant.

D. H. Stapp and *W. H. Matthews*, for appellee.

NIBLACK, J.—This was a suit by Samuel Webster, against Frederick A. York, for an alleged malicious prosecution.

The complaint was in two paragraphs, each alleging that the defendant had maliciously, and without probable cause, filed his affidavit before a justice of the peace, charging the plaintiff with the crime of grand larceny, thereby causing the plaintiff's arrest on such charge.

A demurrer to each paragraph was overruled, and the defendant answered in general denial. A jury returned a verdict for the plaintiff for one hundred dollars in damages, and, notwithstanding a motion for a new trial, raising, amongst other things, the question of the sufficiency of the evidence to sustain the action, judgment was rendered upon the verdict, against the defendant.

Errors are assigned upon the overruling of the demurrer to both paragraphs of the complaint, and upon the refusal of the court to grant a new trial.

The record does not disclose the reservation of any exception to the decision of the court overruling the demurrer to the separate paragraphs of the complaint; consequently no question upon the sufficiency of the complaint is presented here.

At all events, following the cases of *Ruston v. Biddle*, 43 Ind. 515, and *Schoonover v. Reed*, 65 Ind. 318, we see no valid objection to the complaint.

From an examination of the evidence we can not say that, to our minds, a very strong case was made against the appellant, but circumstances were disclosed by the evidence which, we think, fairly tended to sustain the verdict.

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Both an unusual delay in commencing the prosecution complained of, after the alleged commission of the larceny, and in bringing such prosecution to a trial after it was commenced, were apparently shown. It was also shown that the prosecution was eventually dismissed without a trial. These, in connection with other circumstances brought out by the evidence, evidently tended to sustain the action of the jury in returning a verdict for the appellee.

In this condition of the evidence, the well established practice of this court will not permit us to hold that the court below erred in overruling the appellant's motion for a new trial.

The judgment is affirmed, at the appellant's costs.

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96	52
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 THARP ET AL. V. JARRELL.

REAL ESTATE.—*Action to Recover and Quiet Title.*—*Fraudulent Conveyance.*—*Acceptance.*—*Delivery.*—In an action to recover the possession of, and to quiet the title to, certain real estate, the jury, by a special verdict, found that A., the plaintiffs' grantor, being the owner in fee, and in the possession, of such real estate, without the knowledge, assent or acceptance of the grantees, had executed, acknowledged and, six months later, placed on record, but had never delivered, a deed purporting to convey to the plaintiffs, his minor children, in consideration of natural love and affection, the lands in controversy; that such deed was made with intent to cheat, hinder, delay and defraud his creditors, and not for the purpose of saving the lands for his children; that he had remained in possession until he had conveyed to the defendant; that, prior to the execution of the deed, he had mortgaged a portion of the land to the school fund, and, after such deed had been recorded, had purchased such portion and received a conveyance therefor, from the county auditor, on a sale under such mortgage; that, subsequent to the recording of the deed to the plaintiffs, the residue thereof had been sold at sheriff's sale on an execution against A., to the execution creditor, who thereupon conveyed to A.; and that, subsequent to the recording of all of such deeds, A. had conveyed the lands in

Tharp *et al.* v. Jarrell.

question to the defendant, who, in good faith, paid a valuable consideration therefor.

Held, that the defendant is entitled to judgment.

From the Madison Circuit Court.

M. S. Robinson, J. W. Lovett and A. W. Thomas, for appellants.

J. W. Sansberry, E. B. Goodykoontz, W. March and J. A. Harrison, for appellee.

Howk, J.—In this action, the appellants, as plaintiffs, sued the appellee, as defendant, in a complaint of two paragraphs.

In the first paragraph, the appellants alleged, in substance, that they were the owners in fee-simple, and entitled to the possession, of certain real estate, in Madison county, Indiana, particularly described, which the appellee held possession of without right, and had unlawfully kept them out of the possession of, for seven years; wherefore they demanded judgment for the recovery of the possession of said real estate, and of \$1,800 damages for being kept out of the possession thereof.

In the second paragraph of their complaint, the appellants set out their title to said real estate, and they alleged that the appellee claimed to be the owner of said real estate under certain deeds mentioned and described in said paragraph, which deeds, they claimed, were a cloud upon their title; wherefore they asked judgment that said cloud might be removed, and their title quieted to said real estate, and for other proper relief.

The appellee answered in four paragraphs, of which the first was a general denial, and each of the others was an affirmative or special answer. The appellants' demurrers were sustained to the second and third paragraphs, and to the fourth paragraph of the answer they replied by a general denial. The issues joined were tried by a jury, and a special verdict was returned, in substance, as follows:

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“ We, the jury, being required to find a special verdict, find the facts, as follows :

“ 1st. We, the jury, find, that, on and previous to the 25th day of February, 1860, Smith Tharp was the owner in fee, and in possession, of the land described in the complaint ; that on said day he signed and acknowledged a deed purporting to convey said lands, with general warranty, in consideration of natural love and affection, to Almira Tharp, Phebe Tharp, John Tharp, William Tharp, Rudolph Tharp, Malinda Tharp and Mary Ann Tharp, all of whom were his minor children, and upon the 5th of September, 1860, caused said deed to be recorded in the deed record of said county, without at any time actually delivering said deed to the persons named as grantees, and without their acceptance or knowledge that said deed was so signed and recorded, with the intention to hinder, delay, cheat and defraud the creditors of said Smith Tharp, and not to save said lands for his said children. We, the jury, find the above true, according to the evidence.

“ 2d. The jury further find, that, from and after said 25th day of February, 1860, continuously until the 10th day of December, 1866, said Smith Tharp possessed and occupied said tract of land, as his own property, to the same extent and in the same manner as he had done before the 25th day of February, 1860 ; that, on said 10th of December, 1866, said Smith Tharp, joined by his wife, executed to the defendant, Joseph Jarrell, a deed of general warranty for said land, which was acknowledged and recorded in the deed record of said county, on the 28th day of December, 1866 ; that said defendant, in good faith, paid full value for said land, and, on the said 10th of December, took full possession thereof under said deed, and has ever since retained such possession, without let, hindrance, claim or demand, by or from the plaintiffs, or either of them, or said Cornelius Beck or Almira Tharp, before the com-

mencement of this action. We, the jury, find the above correct, according to the evidence.

“3d. The jury further find, that, on the 7th of February, 1860, Smith Tharp executed a mortgage upon the east half of said tract of land to the State of Indiana, to secure a loan of school money, which mortgage was duly acknowledged, and, upon the same day, recorded in the mortgage records of said county of Madison; that afterward, on the 25th day of June, 1864, the auditor of said county, on account of the failure to pay said loan and interest thereon, in due form of law sold and conveyed, by deed in fee, said east half of said land to said Smith Tharp, which deed was duly recorded in the deed records of said county, on the 27th day of Jan’y, [June?] 1864. We, the jury, find the above correct, according to the evidence.

“4th. The jury further find, that, on the 26th of August, 1865, William Nelson, sheriff of said county of Madison, conveyed in fee-simple the west half of said tract of land to James W. Sansberry, in pursuance of public sale previously made to said Sansberry by said sheriff, upon an execution issued upon a transcript of a judgment of a justice of the peace of said county, rendered against said Tharp and in favor of Silas Davis, duly certified and recorded in the records of the common pleas court of said county, which judgment was rendered upon a debt of said Tharp, which had accrued previous to the 25th of February, 1860; that said deed was duly acknowledged and recorded in the deed records of said county, on the 25th day of November, 1865; that, on the 2d day of September, 1865, said Sansberry sold and conveyed, for a valuable consideration, said west half of said tract of land to Smith Tharp; that the conveyance was acknowledged on the 25th of November, 1865, was duly recorded in the deed records of said county of Madison. We, the jury, find the above to be correct, according to the evidence.

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"5th. The jury further find, that the plaintiffs, except Almira Beck and Cornelius Beck, are the persons named in said deed, dated 25th of February, 1860; that said Almira Beck died since, and before the commencement of this action, leaving the plaintiff Luella Beck, her only child and heir, and Cornelius Beck, her husband. We, the jury, find the above true, according to the evidence. We, the jury, find for the defendant.

"6th. The jury find, that the rental value of the east half of said land, for the six years immediately preceding the 21st day of November, 1873, the commencement of suit, is \$735.00
And of the west half, 162.00

And of the whole, \$897.00."

Upon the return of the special verdict, the appellants moved the court in writing for judgment thereon in their favor, which motion was overruled, and to this ruling they excepted. The appellee also moved the court in writing for judgment in his favor on the special verdict, which motion was sustained, and the appellants excepted to this decision, and the court rendered judgment for the appellee.

The appellants' motion for a new trial was overruled by the court, and to this ruling they excepted and have appealed from the judgment rendered to this court.

The appellants have here assigned, as errors, the following decisions of the court below:

1. In overruling their motion for judgment in their favor on the special verdict;
2. In sustaining the appellee's motion for judgment in his favor, on the special verdict; and,
3. In overruling their motion for a new trial.

The first two of these alleged errors may well be considered together; for each of them presents the question,

What was the proper judgment to be rendered on the special verdict, or rather which of the parties was entitled to a judgment on the verdict? It is very clear, that, if the court erred in overruling the appellants' motion for judgment, it also erred in sustaining the appellees' motion for judgment in his favor; and it is equally clear, that, if the appellants were not entitled to a judgment, the appellee was entitled to a judgment in his favor, on the special verdict of the jury.

It seems to us, however, that the facts found by the jury in their special verdict were not sufficient to show that the appellants were the owners, and entitled to the possession, of the real estate in controversy. Of course, the appellants, as plaintiffs, had the burthen of the issues, and could only recover, if they recovered at all, by the strength and validity of their own title, and not through any defect or weakness in the appellee's title. The jury found, in their special verdict, that, on and before the 25th day of February, 1860, Smith Tharp was the owner in fee and in the possession of the lands described in the appellants' complaint; and further, that, while the said Smith Tharp was thus the owner and in possession of said lands, he signed, acknowledged and caused to be recorded a deed conveying the said real estate to the appellants in this action. But the jury failed to find, as it seems to us, that the said Smith Tharp ever delivered, or intended to deliver, either actually or constructively, the said deed of conveyance so signed and acknowledged by him, and recorded as aforesaid, to the appellants, or either of them. It needs hardly to be said that the delivery of a deed, by the grantor to the grantee, is an essential part of its execution. Without such delivery, a deed of conveyance, though signed, acknowledged and recorded, is wholly inoperative, and passes no title whatever to the premises therein described.

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In the first clause of their special verdict, as we have seen, the jury found that the said Smith Tharp had signed and acknowledged the deed to the appellants, under which they claimed title to the lands in controversy, and had caused the said deed to be recorded, without at any time delivering said deed to the grantees therein, and without their acceptance thereof or knowledge of its signature and record, with the intent to cheat, hinder, delay and defraud his creditors, and not to save said lands for his children, the grantees in said deed. In the face of this finding of the jury, we fail to see upon what legal ground the appellants can claim any valid title to the lands in controversy under Smith Tharp's deed; for the jury have found, not only that there was no delivery of said deed, but that there had been no acceptance of the deed by the grantees therein. It is well settled, we think, that such a deed will not operate as a conveyance of any title whatever to the persons named therein as grantees. *McNeely v. Rucker*, 6 Blackf. 391; *Goodsell v. Stinson*, 7 Blackf. 437; *Dearmond v. Dearmond*, 10 Ind. 191; *Woodbury v. Fisher*, 20 Ind. 387. It seems to us, therefore, that the court committed no error, either in overruling the appellants' motion, or in sustaining the appellee's motion, for a judgment on the special verdict.

In regard to the third alleged error, the overruling of the motion for a new trial, the appellants' counsel say, in their brief of this cause: "We are satisfied the bill of exceptions is imperfect as to the evidence, and we will not, therefore, argue the motion for a new trial." This is equivalent to an express waiver of the third alleged error.

The judgment is affirmed, at the appellants' costs.

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CITY TREASURER.—*Action on Bond of Defaulting Treasurer.*—*Sureties not Estopped by Entries of Principal.*—The entries made by a city treasurer in the books kept for that purpose, purporting to be a statement of the funds of the city on hand at the close of a preceding and the beginning of a new term, are not conclusive upon, but may be contradicted by, his sureties, in an action against the treasurer and his sureties on his official bond, executed by them at the commencement of the new term. *The State, ex rel., v. Grammer*, 29 Ind. 530, and *The State, ex rel., v. Prather*, 44 Ind. 287, overruled.

From the Vanderburgh Circuit Court.

C. Denby and *D. B. Kumler*, for appellants.

J. E. Williamson, *A. Gilchrist* and *C. H. Butterfield*, for appellee.

PERKINS, J.—In *Baker v. Preston*, Gilmer (Va.), 235, the following, among other points, was decided, viz. :

“The books kept by the treasurer, are conclusive evidence of the balance actually in the treasury at any given time, both against the treasurer, and his sureties, without being pleaded as an estoppel, so as to charge them with balances carried forward from year to year, as if those balances were actually on hand.”

The above proposition was held to be law, in *The State, ex rel., v. Grammer*, 29 Ind. 530, and the latter case was decided upon *Baker v. Preston, supra*. *The State, ex rel., v. Prather*, 44 Ind. 287, followed *The State, ex rel., v. Grammer, supra*; and the Vanderburgh Circuit Court, in the case at bar, followed said preceding cases.

Baker v. Preston, supra, was decided in 1821, and, on the point above mentioned, has been overruled in Virginia by the following cases: *Munford v. The Overseers, etc.*, 2 Rand. 313, decided in 1824; *Jacobs v. Hill*, 2 Leigh, 393, decided in 1830; *Craddock v. Turner's Adm'x*, 6 Leigh, 116, decided in 1835; *Crawford v. Turk*, 24 Grat. 176, decided in 1874; and denied to be law, in an elaborate

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opinion by LEWIS C. J., speaking for the court, in *The State of Nevada v. Rhoades*, 6 Nev. 352, in which opinion he says of *Baker v. Preston* : "This very singular decision is not relied on by counsel for the State, (although sustaining the ruling of the court below on this point) perhaps for the reason that they do not consider it law. * * * The case, indeed, stands alone, and is at variance with all the cases we have been able to consult, both American and English. We cannot, therefore, rely upon it as authority here."

In *Crawford v. Turk*, *supra*, MONCURE, President of the Court of Appeals, in delivering the unanimous opinion of that court, in noticing the case of *Munford v. The Overseers, etc., supra*, said :

"In that case it was held that a judgment against a principal in a bond is not conclusive evidence against his sureties. It was an action of debt brought in the name of the Governor of Virginia, for the benefit of the overseers of the poor of Nottoway county, against Munford and others, on a bond given by said Munford, for the faithful discharge of his duties as sheriff, with the other defendants as his sureties. The only question in the case was, whether a judgment which had been recovered by the overseers against the sheriff as collector of the poor rates of the county, was conclusive evidence that the sheriff had been appointed to collect them and precluded and estopped the sureties from giving any evidence going to contradict that fact. It was admitted that the judgment was conclusive of that fact against the sheriff, or rather would have been conclusive of it in a separate action brought against him ; but whether it was conclusive in an action against the sureties, or even in an action brought against the sheriff and his sureties jointly, was the question. 'The question how far sureties,' says Judge GREEN in delivering his opinion in the case, 'are bound by a judgment or other

evidence against their principal, which estops or concludes him, has never, as far as I am informed, been settled in this court, except in the case of *Baker v. Preston and others*, Gilm. 235, decided in a special court. In that case it was decided that the treasury books kept by Preston were conclusive evidence against him, and estopped him from giving any evidence to contradict them, and that his sureties were, in like manner, estopped and concluded. The court argued that if a judgment against the principal would conclude his sureties, so ought the evidence on which such judgment is rendered to conclude them.' But Judge GREEN proceeded to show that the cases relied on by the special court did not sustain it and after reviewing the authorities on the subject, he concludes: 'I think, therefore, that the question is still open, whether a judgment against the principal is conclusive evidence against the sureties or not.' He then proceeds to give his views upon the question thus: 'The general rule is that verdicts and judgments bind conclusively parties and privies; because privies in blood, in estate, and in law claim under the person against whom the judgment is rendered; and they claiming his rights, are, of course, bound as he is. But as to all others, they are not conclusively binding; because it is unjust to bind a party by any proceeding in which he had no opportunity of making a defence, of offering evidence, of cross-examining witnesses, or appealing, if he was dissatisfied with the judgment; and this is called by the court in *Bourke v. Granberry*, "a golden rule," Gilm. 16, 25. Sureties and joint contractors do not claim to any purpose under their principal, or under each other.'" Freeman Judgments, 2d ed., sec. 180.

" 'There are cases,' the Judge then proceeds to say, 'in which those who are not parties to the suit, and do not claim under either of the parties, may be bound by the judgment, as in the cases of contracts of indemnity, and in the

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nature of contracts of indemnity, and in those cases which a person, although not in form a party to the suit, is bound to assist in the prosecution or defence, and either does so in fact, or, having notice of the pendency of the suit, fails to do so. But these cases do not come within the principle or reason of the general rule aforesaid; and the case of principal and surety, so far as it relates to the effect upon the sureties, of a judgment against the principal, does not come within the reason of this latter class of cases.’”

President MONCURE proceeds :

“ Now the case we have under consideration falls under the latter class, and not under the general rule referred to by Judge GREEN ; and what he says tends, therefore, to sustain the view that the judgment in this case was conclusive against the sureties as well as against the deputy. Their bond is a bond of indemnity within the meaning of the class of cases referred to, and the deputy was a person, in the meaning of those cases, who, although not in form a party to the action against the sheriff, was bound to assist in defence of the same and did so in fact.” Freeman Judgments, chap. 9, sec. 181.

A judgment against the treasurer alone would not have been conclusive against the sureties, much less were his entries in his book of accounts.

The case at bar is that of a suit against the city treasurer of the City of Evansville, Ind., and his sureties, upon his official bond as such, in the usual form, prospective in its terms, executed at the commencement of his last term as such treasurer, in May, 1875. It was conditioned thus: “ If the said Charles Ohning shall diligently and faithfully discharge the duties of his said office during his continuance therein, and pay over to said city, or to the person or persons authorized to receive the same, all moneys or funds belonging to said city which may come into his hands, and deliver to his successor all books, papers,” etc.

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The condition was not that he should pay all amounts for which he might suffer the city to obtain judgment against him.

“That new sureties are not responsible for prior defalcations, unless the condition of the new obligation shall embrace them, is a principle which has frequently been decided by the courts.”

Farrar v. The United States, 5 Pet. 373; *The United States v. Boyd*, 15 Pet. 187; *The United States v. Linn*, 1 How. 104; *Myers v. The United States*, 1 McLean, 493; *The Postmaster General v. Norvell*, Gilpin, 106; *The County of Mahaska v. Ingalls*, 16 Iowa, 51; *Bessinger v. Dickerson*, 20 Iowa, 260; *Inhabitants, etc., v. Stanley*, 47 Me. 515; *Inhabitants, etc., v. Randall*, 105 Mass. 295; *Lowry v. The State, ex rel.*, 64 Ind. 421; *The State, ex rel., v. Hauser*, 63 Ind. 155.

It is a familiar principle, that “The obligation of a surety is a matter of strict law, and can never arise from implication. The bond must speak for itself, and its language can never be extended or altered, to the injury of the surety.” *Myers v. The United States, supra*. “It would be a violation of this elementary principle to hold the sureties on the last bond liable for the defaults of the first as well as the second term.” *Vivian v. Otis*, 24 Wis. 518.

In the case at bar, the sureties had a right to make any defence they could have interposed had the suit been against them alone.

The court gave the following instructions to the jury :

“The defendants, the sureties, deny the complaint, and rely upon the fact, that, as they allege, the balance not paid over was not in fact received during the term of office covered by the bond, but that the same was received by Ohning in a former term, and simply brought over, as a balance upon the books. The evidence tends to show that by the books of the defendant Ohning, as treasurer, there

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was, at the close of his term, a balance of somewhere near four thousand dollars in orders, and a few hundred dollars in cash, and that he has failed to pay the same to his successor.

"The court also permitted the defendants to prove, over objection, that the money and orders were received before the bond in suit was executed; but you are now instructed to disregard this testimony, in the consideration of the case, and to consider the case as though this evidence had not been given.

"The proposition upon which the defence is based looks plausible, and has a show of equity and justice. But public policy requires that public officers shall be held to a strict accountability in their discharge of public duty, and especially in their dealings with the public money. Hence, when a public officer makes entries in his official books, both he and his sureties are concluded by them."

The sureties, defendants, asked the court to instruct the jury thus:

"If the jury believe from the evidence, that Charles Ohning has fully and completely accounted for all the city orders received by him since the execution and delivery of the bond sued on, and has paid to the city all sums of money received by him since the execution and delivery of said bond, then, under the issues in this case, the jury should find a verdict for the sureties in said bond."

This instruction was refused. Proper exceptions to the giving and refusing of the foregoing instructions were reserved.

If the doctrine be established, that a public treasurer can conclusively bind his sureties by entries in his book, then, we may remark, whenever he holds the office for successive terms, he can, at will, select the sureties upon whom he will saddle the burden of his defalcations.

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We have, we think, shown that upon a prospective bond, the sureties therein can not legally nor justly be held liable for the defalcation of their principal which occurred during a prior term of his office and the existence of a prior bond; and, also, that the entries in the books of such treasurer, by the law as everywhere held except in Indiana, are not conclusive upon the sureties.

It logically follows that it is erroneous to exclude evidence offered by the sureties upon a trial of a suit, such as was the present, from the consideration of the jury, tending to show such entries erroneous. *Thomas v. Hubbell*, 15 N. Y. 405; S. C., 35 N. Y. 120.

The cases of *The State, ex rel., v. Grammer*, 29 Ind. 530, and *The State, ex rel., v. Prather*, 44 Ind. 287, and other cases following them, on the point decided in the present case, are overruled.

We have not set out the pleadings in the cause, nor the rulings during the progress of the trial. We have presented the main legal question upon which the decision of the cause now and hereafter must turn.

The judgment below is reversed, with costs, and cause remanded for further proceedings in accordance with this opinion.

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MANHEIM v. THE STATE.

CRIMINAL LAW.—Billiards.—Suffering Minors to Congregate.—Indictment.—Constitutional Law.—Title of Act.—Public Place.—An indictment charged that, on, etc., at, etc., the defendant, "having the care, management and control of certain billiard tables, then and there kept in a public billiard hall, did then and there unlawfully suffer and permit" certain minors named "to then and there unlawfully congregate at, in and about said public billiard hall, wherein the said billiard tables were so kept," etc.
Held, that the indictment is sufficient.

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Held, also, that the subject-matter of section 2 of the act of March 12th, 1878, 2 R. S. 1876, p. 484, is properly embraced in the title of the act.

Held, also, that the words "public billiard hall," used in the indictment, indicate a public place where billiard tables were kept to be used in playing billiards.

From the Kosciusko Circuit Court.

L. H. Haymond and — *Royse*, for appellant.

T. W. Woollen, Attorney General, for the State.

Howe, J.—The indictment against the appellant in this case was, in substance, as follows :

"The grand jurors for the county of Kosciusko, in the State of Indiana, upon their oaths charge and present, that Marks Manheim, on the tenth day of November, in the year eighteen hundred and seventy-eight, and on divers other days and times between that day and the day of the making of this presentment, at said county, having the care, management and control of certain billiard tables, then and there kept in a public billiard hall, did then and there unlawfully suffer and permit Franklin Upson, Solomon Shane, Charles Kirtley, William Kirtley, Harry Hutton, Charles Nye, William Nye, John Millia, Charles Millia and George Ritter, persons then and there minors and under the age of twenty-one years, to then and there unlawfully congregate, at, in and about said public billiard hall, wherein said billiard tables were so kept, contrary to the form of the statute," etc.

The appellant's motion to quash this indictment was overruled by the court, and to this decision he excepted. Upon arraignment, the appellant, for plea to said indictment, said that he was guilty, as therein charged, and thereupon, a jury having been waived, the court assessed a fine against him, and rendered judgment accordingly.

The decision of the circuit court in overruling his motion to quash the indictment is the only error assigned by the appellant in this court.

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The offence for which the appellant was indicted is defined, and the punishment therefor is prescribed, in section 2 of an act entitled "An act making it unlawful for owners and proprietors of billiard tables to suffer or permit minors to play at or upon the same, or to suffer or permit minors to congregate at and about such billiard tables, and providing penalties for the violation of this act," approved March 8th, 1873. This section 2 of said act reads as follows :

"SEC. 2. That any person owning, or having the care, management, or control of any billiard table or tables, bagatelle table or pigeon-hole table kept in any saloon, hotel or other public place, who shall suffer or permit minors to congregate at, in and about such place where such billiard table or tables, bagatelle table or pigeon-hole table may be kept, shall, for each offence, be fined in any sum not less than twenty-five dollars, nor to exceed five hundred dollars." 2 R. S. 1876, p. 484.

It is claimed by the appellant's counsel, in argument, that the offence for which the appellant was indicted and fined in this case, although it is accurately defined in section 2, above quoted, of the above entitled act, is not embraced in or covered by the title of the act. For this reason counsel insist that so much of section 2 as provides that any person, "having the care, management, or control of any billiard table or tables," who shall violate the provisions of said section, shall be punished as therein provided for, is unconstitutional and void, because it is outside of, and is not expressed in, the title of the act. It is said, that "the clear intent of the Legislature, as gathered from the title when considered by itself, is, that the inhibition should extend only to *owners* and *proprietors* of billiard tables. Nothing is said in this title about the persons 'having the care, management, or control' of billiard tables; this latter subject is not mentioned in the title.

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The second section of this act, however, goes farther than the title, and not only includes owners, but extends the act so as to take in persons having the 'care, management, or control' of billiard tables. In so far, then, as this section makes it criminal for persons 'having the care, management, or control' of billiard tables to suffer or permit minors to congregate at the place where they are kept, it must be regarded as unconstitutional, because this subject is not embraced in the title of the act."

This is the argument of the appellant's learned attorneys, on the point now under consideration. It places a narrow and illiberal construction upon a statute which, we think, should be generously and liberally construed. "The clear intent of the Legislature," as it seems to us, as gathered both from the title and the body of the act, was to prevent boys and unfledged youths from being misled, by fascinating and seductive games, into the paths of vice and immorality. Such a statute, for such a purpose, should be upheld and enforced by the courts, and should receive a liberal and enlarged, rather than a narrow and contracted, construction. We think that it may well be said, that a person "having the care, management, or control" of a billiard table, has such a property in the table as would make him an "owner and proprietor" of the billiard table, within the purview and meaning of those words as used in the title of the above entitled act, and as would legally subject him, for any violation of the provisions of section 2 of said act, to the penalties thereof. The statute is not, nor is any of its provisions, unconstitutional and void, by reason or on account of any supposed defect in the title of the act.

One other point is made by the appellant's counsel, in regard to section 2 of the above entitled act, which, it seems to us, is not involved in nor presented by the indictment, in the case now before us. It is provided in said

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section, that any person owning, etc., any billiard table, etc., "kept in any saloon, hotel or other public place, who shall suffer or permit minors to congregate at, in and about such place," etc., "shall for each offence be fined," etc. It is said by the appellant's attorneys, and we think correctly so, that, although the language used in this section, in so far as the *locus in quo* is concerned, is broad enough to include any place where billiard tables, etc., might be kept, even on sale or temporarily and not for the purpose of playing thereon, yet it was the intention of the legislature to include only such public places as billiard tables, etc., might be kept in, for the purposes of playing thereon. Therefore, it would be necessary, we think, in a prosecution for a violation of the provisions of section 2 of the above entitled act, that the indictment or information should show, by apt words or phrases, that the public place, at, in and about which the person charged suffered or permitted minors to congregate, was a public place, wherein billiard tables, etc., were kept for the purposes of playing thereon. This has been shown, clearly and unequivocally, as it seems to us, in the indictment in the case at bar, by the use of the phrase, "public billiard hall," in the description of the public place at, in and about which it was charged that the appellant suffered and permitted certain named minors to congregate. In common parlance, the phrase, "public billiard hall," clearly means a public place or hall, wherein billiard tables are kept for the purpose of playing thereon. We recognize the correctness of the rule contended for by the appellant's counsel, that, "where a statute in a criminal case is not to be taken in the broad meaning of the words used, but limited by construction * *, it is proper that an indictment should charge the crime, not in the language of the statute simply, but limit the case and bring it within the construction placed upon the act." *Bates v. The State*, 31

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Ind. 72. This rule, however, has been fully complied with, we think, in the indictment in this case.

In our opinion, the court did not err in overruling the appellant's motion to quash the indictment.

The judgment is affirmed, at the appellant's costs.

ON PETITION FOR A REHEARING.

PERKINS, J.—The petition for a rehearing of this case is overruled. The constitutional provision supposed to be violated by the act is, that "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title."

REED v. THE STATE, EX REL. ROBERTS.

BASTARDY.—*Appeal by the State, to Circuit Court.*—*Time.*—*Justice of the Peace.*—An appeal by the State to the circuit court, from the judgment of a justice of the peace discharging the defendant in a prosecution for bastardy, under sec. 64, 2 R. S. 1876, p. 621, must be taken, within thirty days from the rendition of such judgment.

From the Marion Circuit Court.

Mark A. Smith, for appellant.

W. P. Adkinson, for appellee.

BIDDLE, J.—On the 4th day of September, 1878, the relatrix filed her complaint before a justice of the peace, charging the appellant with being the father of her bastard child.

On the 17th of September, 1878, a trial was had, and the defendant discharged. On the 14th day of November, 1878, the State appealed from the judgment of the justice to the circuit court, wherein the appellant moved to

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dismiss the appeal upon the ground that the appeal had not been taken within thirty days after the rendition of the judgment. The court overruled the motion, and the appellant excepted. A subsequent trial was had, and the appellant found guilty of the charge. The court rendered judgment of affiliation against the appellant and committed him to jail until the judgment should be paid or replevied. He appeals to this court. The sole question in the case is: Did the court err in overruling the motion to dismiss the appeal?

The bastardy act makes no provision for an appeal; but by that act the proceedings must be commenced before a justice of the peace, and the justice's act, section 64, provides that "Any party may appeal from the judgment of any justice to * * * the circuit court, within thirty days from the rendition thereof."

Section 68 provides that such appeals may be authorized by the circuit court, "after the expiration of thirty days, when the party seeking the appeal has been prevented from taking the same by circumstances not under his control." But this appeal was not taken under section 68. It therefore must stand upon section 64, which requires an appeal to be taken within thirty days after the rendition of the judgment. This appeal, not having been taken within thirty days, ought to have been dismissed on the motion of the appellant. *Walker v. The State*, 6 Blackf. 1; *Risk v. The State, ex rel.*, 19 Ind. 152; *Glenn v. The State, ex rel.*, 46 Ind. 368; *Dibble v. The State, ex rel.*, 48 Ind. 470; *Galvin v. The State, ex rel.*, 56 Ind. 51.

The judgment is reversed, and the cause remanded, with instructions to sustain the appellant's motion to dismiss the appeal and to render judgment thereon.

The State v. Carey.

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THE STATE v. CAREY.

SURETY OF PEACE.—*Circuit Court.*—*Criminal Circuit Court.*—*Where Defendant should be Recognized to Appear.*—*Jurisdiction.*—Where, in a proceeding before a justice of the peace to obtain surety of the peace, the justice finds against the defendant, the latter should be recognized to appear in the criminal circuit court of such county, if there be such a court therein; otherwise in the civil circuit court.

SAME.—*Relator.*—*Parties.*—A proceeding to obtain surety of the peace should be instituted in the name of the State, without any relator.

From the Allen Criminal Circuit Court.

T. W. Woollen, Attorney General, and *S. M. Hench*, for the State.

Howk, J.—On the 20th day of June, 1879, one Francis J. Barcot filed his affidavit with a justice of the peace of Allen county, Indiana, to the effect that he had just cause to fear, and did fear, that the appellee, David B. Carey, would injure him personally by violence, and that he made said affidavit only to secure the protection of the laws, and not from anger or malice.

Upon this affidavit, the justice issued his warrant and the appellee was arrested; and, on his application, the venue of the cause was changed to another justice of the peace of said county. Before this latter justice, the trial of the case resulted in a judgment, to the effect that the statements in the affidavit of the prosecuting witness were true, and requiring the appellee to file his recognizance, in the penal sum of one hundred dollars, for his appearance at once in the Allen Criminal Circuit Court.

In the court below the parties appeared, and the court, of its own motion, dismissed the case from said court, and ordered the clerk to file the papers in this case in the office of the clerk of the Allen Civil Circuit Court, with a request that the case be placed on the docket of that court, to all of which rulings the State, by its attorney, ex-

cepted. Final judgment, for such dismissal of the case, was then rendered by the court below, from which judgment the State, by its attorney, has appealed to this court.

The State has assigned, as error, the decision of the court below, upon its own motion, dismissing the case from that court, in order that it might be filed and docketed in the Allen Civil Circuit Court. The only question presented for our decision, by the record of this cause and the error assigned thereon, may be thus stated: Which one of the two courts in Allen county, the criminal circuit court or the civil circuit court, has jurisdiction of prosecutions to obtain surety of the peace? Such prosecutions are authorized and governed by the provisions of sections 22 to 30, both inclusive, of "An act prescribing the powers and duties of justices of the peace in state prosecutions," approved May 29th, 1852. In section 24 of said act it was provided that where, as in this case, the justice or jury trying the issue should find that the complaining witness had just grounds to entertain the fears expressed in his affidavit, the justice should require of the defendant recognizance and freehold surety for his appearance on the first day of the next term of the court of common pleas, etc. 2 R. S. 1876, p. 675.

It has been repeatedly decided by this court, and we can not well see how it could be decided otherwise, that prosecutions to obtain surety of the peace were criminal prosecutions. *The State v. Abrams*, 4 Blackf. 440; *The State v. Maners*, 16 Ind. 175; *Murray v. The State*, 26 Ind. 141; *The State v. Vankirk*, 27 Ind. 121; *Deloohery v. The State*, 27 Ind. 521; and *Fisher v. Hamilton*, 49 Ind. 341. Under the provisions of an act approved March 11th, 1867, the county of Allen was created into and thereafter constituted the Twentieth Judicial Circuit, in which there was thereby established a criminal court. 1 R. S. 1876, p. 393. By the 5th section of said act, as we construe its provisions,

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THE STATE v. CAREY.

SURETY OF PEACE.—*Circuit Court.*—*Criminal Circuit Court.*—*Where Defendant should be Recognized to Appear.*—*Jurisdiction.*—Where, in a proceeding before a justice of the peace to obtain surety of the peace, the justice finds against the defendant, the latter should be recognized to appear in the criminal circuit court of such county, if there be such a court therein; otherwise in the civil circuit court.

SAME.—*Relator.*—*Parties.*—A proceeding to obtain surety of the peace should be instituted in the name of the State, without any relator.

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In the court below the parties appeared, and the court, of its own motion, dismissed the case from said court, and ordered the clerk to file the papers in this case in the office of the clerk of the Allen Civil Circuit Court, with a request that the case be placed on the docket of that court, to all of which rulings the State, by its attorney, ex-

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cepted. Final judgment, for such dismissal of the case, was then rendered by the court below, from which judgment the State, by its attorney, has appealed to this court.

The State has assigned, as error, the decision of the court below, upon its own motion, dismissing the case from that court, in order that it might be filed and docketed in the Allen Civil Circuit Court. The only question presented for our decision, by the record of this cause and the error assigned thereon, may be thus stated: Which one of the two courts in Allen county, the criminal circuit court or the civil circuit court, has jurisdiction of prosecutions to obtain surety of the peace? Such prosecutions are authorized and governed by the provisions of sections 22 to 30, both inclusive, of "An act prescribing the powers and duties of justices of the peace in state prosecutions," approved May 29th, 1852. In section 24 of said act it was provided that where, as in this case, the justice or jury trying the issue should find that the complaining witness had just grounds to entertain the fears expressed in his affidavit, the justice should require of the defendant recognizance and freehold surety for his appearance on the first day of the next term of the court of common pleas, etc. 2 R. S. 1876, p. 675.

It has been repeatedly decided by this court, and we can not well see how it could be decided otherwise, that prosecutions to obtain surety of the peace were criminal prosecutions. *The State v. Abrams*, 4 Blackf. 440; *The State v. Maners*, 16 Ind. 175; *Murray v. The State*, 26 Ind. 141; *The State v. Vankirk*, 27 Ind. 121; *Deloohery v. The State*, 27 Ind. 521; and *Fisher v. Hamilton*, 49 Ind. 341. Under the provisions of an act approved March 11th, 1867, the county of Allen was created into and thereafter constituted the Twentieth Judicial Circuit, in which there was thereby established a criminal court. 1 R. S. 1876, p. 393. By the 5th section of said act, as we construe its provisions,

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SURETY OF PEACE.—*Circuit Court.*—*Criminal Circuit Court.*—*Where Defendant should be Recognized to Appear.*—*Jurisdiction.*—Where, in a proceeding before a justice of the peace to obtain surety of the peace, the justice finds against the defendant, the latter should be recognized to appear in the criminal circuit court of such county, if there be such a court therein; otherwise in the civil circuit court.

SAME.—*Relator.*—*Parties.*—A proceeding to obtain surety of the peace should be instituted in the name of the State, without any relator.

From the Allen Criminal Circuit Court.

T. W. Woollen, Attorney General, and S. M. Hensch, for the State.

Howk, J.—On the 20th day of June, 1879, one Francis J. Barcot filed his affidavit with a justice of the peace of Allen county, Indiana, to the effect that he had just cause to fear, and did fear, that the appellee, David B. Carey, would injure him personally by violence, and that he made said affidavit only to secure the protection of the laws, and not from anger or malice.

Upon this affidavit, the justice issued his warrant and the appellee was arrested; and, on his application, the venue of the cause was changed to another justice of the peace of said county. Before this latter justice, the trial of the case resulted in a judgment, to the effect that the statements in the affidavit of the prosecuting witness were true, and requiring the appellee to file his recognizance, in the penal sum of one hundred dollars, for his appearance at once in the Allen Criminal Circuit Court.

In the court below the parties appeared, and the court, of its own motion, dismissed the case from said court, and ordered the clerk to file the papers in this case in the office of the clerk of the Allen Civil Circuit Court, with a request that the case be placed on the docket of that court, to all of which rulings the State, by its attorney, ex-

cepted. Final judgment, for such dismissal of the case, was then rendered by the court below, from which judgment the State, by its attorney, has appealed to this court.

The State has assigned, as error, the decision of the court below, upon its own motion, dismissing the case from that court, in order that it might be filed and docketed in the Allen Civil Circuit Court. The only question presented for our decision, by the record of this cause and the error assigned thereon, may be thus stated: Which one of the two courts in Allen county, the criminal circuit court or the civil circuit court, has jurisdiction of prosecutions to obtain surety of the peace? Such prosecutions are authorized and governed by the provisions of sections 22 to 30, both inclusive, of "An act prescribing the powers and duties of justices of the peace in state prosecutions," approved May 29th, 1852. In section 24 of said act it was provided that where, as in this case, the justice or jury trying the issue should find that the complaining witness had just grounds to entertain the fears expressed in his affidavit, the justice should require of the defendant recognizance and freehold surety for his appearance on the first day of the next term of the court of common pleas, etc. 2 R. S. 1876, p. 675.

It has been repeatedly decided by this court, and we can not well see how it could be decided otherwise, that prosecutions to obtain surety of the peace were criminal prosecutions. *The State v. Abrams*, 4 Blackf. 440; *The State v. Maners*, 16 Ind. 175; *Murray v. The State*, 26 Ind. 141; *The State v. Vankirk*, 27 Ind. 121; *Deloohery v. The State*, 27 Ind. 521; and *Fisher v. Hamilton*, 49 Ind. 341. Under the provisions of an act approved March 11th, 1867, the county of Allen was created into and thereafter constituted the Twentieth Judicial Circuit, in which there was thereby established a criminal court. 1 R. S. 1876, p. 393. By the 5th section of said act, as we construe its provisions,

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the Allen Criminal Circuit Court was thereby clothed with complete and exclusive jurisdiction of all such criminal actions, as either the Allen Civil Circuit Court or the Court of Common Pleas of Allen county had then or thereafter might have acquired jurisdiction, if such criminal court had not been created by the passage of said act, under and by virtue of the statutes of this State then in force. 1 R. S. 1876, p. 394.

It seems to us, therefore, that, after the Allen Criminal Circuit Court was so created and established, and clothed by law with the jurisdiction which the Court of Common Pleas of Allen county then had of and over criminal prosecutions, it became and was, and ever since has been, the duty of the justices of the peace of said county, in all prosecutions to obtain surety of the peace before such justices, where, as in this case, the justice or jury trying the case should find that the complaining witness had just grounds to entertain the fears expressed in his affidavit, to require of the defendant recognizance and freehold surety for his appearance in the Allen Criminal Circuit Court, as was done in this case, instead of in the court of common pleas as provided in the statute. In our opinion, the justice properly required of the appellee, in this case, a recognizance for his appearance in the court below. The cause was properly docketed, and ought to have been tried, in the Allen Criminal Circuit Court, as that court alone was authorized to try such cases, after the passage of the act which created and established such criminal court, and clothed it with the jurisdiction of the court of common pleas over all such criminal actions. We are clearly of the opinion, therefore, that the decision of the court below, of its own motion, in dismissing this cause from that court, was erroneous; for it seems to us, that court had complete jurisdiction, under the statutes of this State, over this cause.

Wilson v. Powers.

We have no brief from the appellee in this case; but we learn from the brief of the State's attorney, that it was urged below, as a ground for the dismissal of the case, that it was improperly entitled in the name of *The State of Indiana v. David B. Carey*; whereas it was claimed that it ought to have been entitled in the name of *The State of Indiana, on the relation of Francis J. Barcot, v. David B. Carey*. There is no provision in the statutes of this State which requires that prosecutions to obtain surety of the peace should be entitled in the name of the State, on the relation of the complaining witness; but, if it were otherwise, it seems to us that the defective entitling of the cause would afford no sufficient ground for its dismissal.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to the court below to re-docket the cause in that court for trial, "under the rules governing such trials before justices," as the statute requires.

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SHERIFF'S SALE.—*Action for Rents of Real Estate Sold.—Purchaser from Judgment Debtor not Liable.*—One who, under a conveyance from the judgment debtor, enters into possession of real estate sold at sheriff's sale, and retains possession until the expiration of the year for redemption, is not liable to either the purchaser or his assignee for the rents.

From the Elkhart Circuit Court.

H. D. Wilson and *W. C. Wilson*, for appellant.

J. M. Vanfleet and *M. F. Shuey*, for appellee.

NIBLACK, J.—This was a suit by Susan J. Powers, against William C. Wilson, for the recovery of rent for the use and occupation of certain real estate.

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The cause was tried by the court upon an agreed statement of the facts, which, so far as material for our consideration here, may be summarized as follows:

That one James H. Speakman, being the owner in fee of lot 26 in the town of Elkhart in Elkhart county, on the 1st day of June, 1867, together with his wife, mortgaged said lot to one Samuel Powers, to secure the payment of a debt of seven hundred dollars; that, on the 3d day of June, 1867, the said Speakman and wife further mortgaged said lot to one Calvin Crane, to secure a debt of one thousand two hundred dollars; that, in September, 1869, judgments of foreclosure were duly rendered in the Elkhart Circuit Court, upon said mortgages, in favor of the said Powers and Crane respectively; that, on the 12th day of February, 1870, upon an order of sale issued upon the judgment in favor of Powers, said lot was sold by the proper sheriff to the said Calvin Crane, for the sum of two thousand six hundred dollars, that being sufficient to satisfy both judgments, and the said Crane receiving a certificate of sale from such sheriff, entitling him to a deed for said lot at the expiration of one year from the time of such sale; that, on the 12th day of February, 1871, the said lot not having been redeemed, the sheriff executed a deed for it to the said Crane; that, in June, 1871, Crane conveyed said lot to the said Susan J. Powers, and sold to her all his interest in an alleged right of action against the defendant, Wilson, for occupying and using said lot, as hereinafter stated; that, when suits were commenced by Powers and Crane upon their mortgages, Wilson was a practising attorney of the county, and was employed by, and appeared for, Speakman and wife in said suits; that, during the pendency of said suits, Speakman and wife, for a valuable consideration and in good faith, conveyed their equity of redemption in the lot mortgaged as above, to the said Wilson, who afterward went into possession under

such conveyance, and continued in possession under it from the 12th day of February, 1870, until the 12th day of February, 1871, that is to say, from the time of the sale of said lot by the sheriff until the time for its redemption had expired, and no longer; that the rental value of said lot during the time Wilson so used and occupied it was eighteen dollars per month, and that, although Wilson was notified while in possession that rent would be required of him, he never paid, or promised to pay, any one rent for the use of said lot.

Crane was made a defendant to answer as to his interest in the subject-matter of the suit, but no judgment of any kind was taken against him.

Upon the agreed statement of facts as above, which was all the evidence in the cause, the court found for the plaintiff in the sum of two hundred and sixteen dollars, and, over the objection of the defendant, rendered judgment against him for that sum.

The controlling question, and the only one we need consider, is: Was the finding of the court sustained by the facts, as thus agreed upon by the parties?

That question must be decided in the negative.

The act authorizing the redemption of real estate sold upon execution, or upon any order of sale in a judicial proceeding, provides, amongst other things, that "The judgment debtor shall be entitled to the possession of the premises for one year after the sale, and in case they are not redeemed at the end of the year as provided in this act, he shall be liable to the purchaser for their reasonable rents and profits." 2 R. S. 1876, p. 220, sec. 2.

From this it will be seen, that the judgment debtor, and not the purchaser, is entitled to the possession of the premises for the year succeeding the sale, and that it is only against the judgment debtor that the

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purchaser has any claim for rents and profits during such year. The purchaser not being entitled to the possession of the premises during the year succeeding his purchase, it would seem to inevitably follow, that he is not entitled to receive rent from any one during that period, except when otherwise expressly provided by law. The clause of the statute above quoted does expressly provide otherwise as against the judgment debtor, but not as against any one else. We see nothing in this statute, therefore, which can be construed to make any one liable for rent in a case like this, except the judgment debtor, and have hence come to the conclusion that the court erred in finding as it did upon the evidence before it.

We are fully sustained in the conclusion we have reached by the cases of *Clements v. Robinson*, 54 Ind. 599, and *Powell v. DeHart*, 55 Ind. 94, to which we still adhere upon a full review of so much of them as is applicable to the case before us.

The judgment is reversed, with costs, and the cause is remanded, with instructions to the court below to render judgment in favor of the appellant, Wilson, upon the agreed statement of facts before it.

MANSON ET AL. v. THE STATE, EX REL. LEE.

STATE PRISON NORTH.—*Election, and Term of Office, of Directors.*—Section 1 of the act of March 6th, 1869, 1 G. & H. 470, providing "for the erection of a new prison north of the national road, election of officers therefor, * * * and for the regulation of the same," provides for the election, by a joint vote of the General Assembly, of three directors of that prison, and that they shall hold their offices "for the term of two years, and until their successors are elected and qualified."

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SAME.—*Statute Construed.*—Section 18 of such act has no reference to the election and terms of office of such directors, but simply continues in force the laws and regulations governing the state prison south, so far as the same concerned the warden, clerk and other appointees authorized by law.

SAME.—The directors of the state prison north, elected by the General Assembly of 1877, were entitled to hold their offices until the 11th day of March, 1879, at which time the directors of that prison, previously elected by the General Assembly of 1879, were entitled to succeed the former.

SAME.—*Right to Salary by one not in Possession.*—*Waiver.*—*Mandate.*—*Auditor of State.*—In an action on the relation of a member of such new board, against the auditor of state, to compel him, by mandate, to issue a warrant to the former for his salary, wherein the members of the old board, being admitted as defendants on their own petition, claimed to be the legal directors, the question as to whether the plaintiff's relator could maintain the action, while not in possession of the office, could only be raised, and could be waived, by the auditor of state.

From the Marion Civil Circuit Court.

T. W. Woollen, Attorney General, D. Turpie, H. D. Pierce, J. Bradley and J. A. Bradley, for appellants.

J. R. Coffroth, T. A. Stuart, C. Baker, T. A. Hendricks, O. B. Hord and A. W. Hendricks, for appellee.

Howk, J.—On the 14th day of April, 1879, the appellee's relator, John Lee, filed in the court below his complaint, duly verified, against the appellant Mahlon D. Manson, Auditor of State of the State of Indiana, as sole defendant, and thereon moved the court for an alternative writ of mandate, in accordance with the prayer of said complaint. On the same day, the appellant Manson voluntarily appeared and waived the issuing of such alternative writ of mandate, and filed his demurrer to the relator's verified complaint, upon the ground that it did not state facts sufficient to constitute a cause of action against him, or to warrant the relief prayed for therein. On the 18th day of April, 1879, the court overruled the demurrer to the complaint, and to this decision the appellant Manson excepted.

On the 24th day of April, 1879, the appellant Manson

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withdrew his answer before that time filed, and answered the relator's verified complaint, in substance, as follows :

" Comes now Mahlon D. Manson, Auditor of State, respondent, and, for answer to said petition or complaint, says he has no interest whatever in the proceedings of said relator, except to see that his warrant for said salary shall be issued [by him], as such Auditor of State, to the proper person entitled by law to receive such warrant and salary, as such prison director, and therefore he respectfully prays the judgment and direction of this honorable court, in the premises."

On the same day last named, the appellants Robert Dykes and John W. Baker filed in said cause their verified petition, in substance, as follows :

" The undersigned represent to the court that they have a real and substantial interest in the matters involved in this cause ; that they were duly elected, commissioned and qualified as directors of the northern prison, in said State of Indiana, and have been and are now serving as such directors, under their said election by the General Assembly of said State to the said position ; that they have served as such directors, are now serving as such, and have been ever since the 12th day of March, 1877, and that they are now lawfully entitled to have paid to them the salary of said office of prison directors, which salary, in said cause, is claimed by the relator. Wherefore they pray that they may be made parties defendants hereto, and be permitted to plead and answer as defendants in said cause."

The prayer of said petition was granted by the court, and, on their own application, the appellants Dykes and Baker were made parties defendants in this cause, and allowed and directed to answer the relator's complaint.

No amendment was made by the appellee's relator to his verified complaint, but the appellants Dykes and Baker demurred thereto, upon the ground that it did not state facts sufficient to constitute a cause of action against

them, "or justify any proceedings against them." This demurrer was overruled by the court, and to this ruling they excepted.

The appellants Dykes and Baker then answered the relator's complaint: *First*, by a general denial thereof; and, *secondly*, by an affirmative or special paragraph, the substance of which we will give hereafter. To this second paragraph of answer the relator replied in two paragraphs, the first of which was a special reply, and the second was a general denial.

Upon the affidavit of the appellants Dykes and Baker of the bias and prejudice of the presiding judge of the court below, the cause was removed from before him, and, "with the consent and approval of the parties," the Hon. Livingston Howland was duly appointed as special judge "to hear, try and determine said cause."

The issues joined were tried by the court without a jury, and a finding was made that the relator, John Lee, by virtue of his election and qualification as director of the Indiana State Prison North, mentioned in the appellee's complaint, was, on the 11th day of March, 1879, entitled to the office of director of said prison, and then was in the possession of said office, and in the exercise and performance of the duties thereof; that the relator was subsequently wrongfully excluded from said prison, and from the performance of the duties of said office, by the appellants Dykes and Baker; that, ever since the last named date, the relator had been and then was entitled to the office of director of said prison, and to exercise the duties and receive the salary of said office; that the terms of office of the appellants Dykes and Baker, as directors of said prison, ceased and determined on the said 11th day of March, 1879, and that their subsequent exercise of the duties of said offices of directors of said prison, and their exclusion of the relator and Frederick Hoover from said

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prison, and from their offices as directors thereof, was unauthorized and illegal; that a peremptory mandate should be issued to and against the appellant Manson, Auditor of State, requiring him to audit and issue his warrant on the Treasurer of State for the relator's account for his salary, as a director of said prison, mentioned in his complaint; and that a peremptory mandate should also be issued to and against the appellants Robert Dykes and John W. Baker, requiring them and each of them to cease to attempt to further exercise or perform the duties of the office of a director of said prison, or to longer or further exclude the relator from the said prison, or from the performance and exercise of the duties pertaining to his office as a director of said prison.

The appellants jointly moved the court for a new trial, which motion was overruled, and to this ruling they severally excepted, and judgment was then rendered by the court upon and in accordance with its finding, from which judgment this appeal is now here prosecuted.

In this court, the appellant Manson separately, and the appellants Dykes and Baker jointly, assigned as errors the decisions of the circuit court in overruling their respective demurrers to the relator's verified complaint, and all the appellants jointly assigned as error the decision of the court in overruling their motion for a new trial.

It is necessary, we think, to a proper understanding of the questions presented and discussed by counsel, in this case, and of our decision of those questions, that we should first give a summary at least of the facts alleged by the appellee's relator, in his verified complaint.

The relator alleged, in substance, that, in pursuance of an act of the General Assembly of this State, approved March 5th, 1859, entitled "An act to provide for the erection of a new prison north of the National Road, election of officers therefor, making appropriations, and for the regulation of the same," the Governor of Indiana, on or about

the 11th day of March, 1859, appointed and commissioned three named persons as directors of said Indiana northern state-prison, to serve as such for the term of two years from the said 11th day of March, 1859, and until their successors should be elected and qualified, the General Assembly, by which said act was passed, having failed to elect directors thereunder. The relator then alleged at length and in detail, that, at each biennial session of the Legislature after the passage of said act, commencing with the regular session of 1861, and including the regular session of 1875, the General Assembly had elected three named persons as directors of said northern prison, to serve as such for the term of two years from and after the 11th day of March next succeeding the time of their election; that the three persons thus elected from time to time had qualified on or before the 11th day of March succeeding their election, and had discharged the duties of their offices for the term of two years then next following and until their successors were elected and qualified; that, at the regular session of the Legislature in 1877, the General Assembly had duly elected one Charles B. Luther, and the appellants Dykes and Baker, as directors of said northern prison, to serve as such until the 11th day of March, 1879, and that they, the said Luther and the appellants, were duly commissioned by the Governor of this State as such directors, for the term aforesaid, and, on the 11th day of March, 1877, duly qualified and entered upon the duties of their offices, as such directors, their predecessors in office then and there retiring and surrendering to them the said offices; that, at the regular session of the Legislature in 1879, the General Assembly had duly elected the appellee's relator, John Lee, and Simon Wile and Frederick Hoover, as directors of said northern prison, to succeed the said Luther and the appellants Dykes and Baker, and to serve as such directors until the 11th day of March, 1881, and until their suc-

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cessors should be elected and qualified; that, at the time of their said election, the said Lee, Wile and Hoover, and each of them, were and had since remained eligible and qualified to be elected to said offices, and to hold the same for the whole term for which they had been so elected as aforesaid; that thereupon the said Lee, Wile and Hoover were duly commissioned as such directors by the Governor of this State, on the 18th day of February, 1879, for the term aforesaid, and the appellee's relator, John Lee, qualified as such director, by taking the oath of office, on the 10th day of March, 1879; that, as the relator was informed and believed, the said Simon Wile, on the 10th day of March, 1879, and the said Frederick Hoover, about eight o'clock A. M. of the 11th day of March, 1879, severally qualified as such directors, by taking the oath of office prescribed by law; that the said Lee, Wile and Hoover, about nine o'clock A. M. of the 11th day of March, 1879, at the said northern prison, in Laporte county, Indiana, and within the rooms set apart and used by the directors of said prison, informed the said Luther and the appellants Dykes and Baker, that they, the said Lee, Wile and Hoover, had qualified as such directors of said prison; that afterward, on said last named day, the said Lee, Wile and Hoover met at said prison, in the directors' rooms aforesaid, and duly qualified as a board of directors or board of control, by electing said John Lee president of said board, and by electing James Murdock warden of said prison for the term of four years from said 11th day of March, 1879; that thereupon, on the same day, the said Murdock duly qualified as such warden, by taking the oath of office and giving the official bond required by law, which bond and the sureties therein were, on the same day, duly approved by said board of directors or board of control, and was afterward filed with, and deposited in the care of, the Treasurer of State of this State in his office; that afterward, on the 12th day of March, 1879,

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the said Lee, Wile and Hoover again met at the said prison, as directors thereof, in the directors' rooms aforesaid, and elected Hugh E. Sidener clerk of said board of directors and of said prison, who thereupon duly qualified as such clerk, by taking the oath of office and giving bond as required by law, which bond was approved by said board of directors; that, by reason of the facts aforesaid, the said John Lee became and was a director of said prison, duly elected and qualified, and he entered upon the duties of his office and was in actual possession of said office, on the said 11th day, and during a part of the said 12th day, of March, 1879, and that he was still director of said prison and entitled to perform the duties of the office and to receive the salary and emoluments thereof; that, prior to and at the time of the organization of the said board of directors or board of control, as aforesaid, Charles Mayne was the warden of said prison, having been duly elected as such warden on the 11th day of March, 1875, for the term of four years thence next ensuing, by the then board of directors of said prison; that, upon the qualification of said Murdock as such warden of said prison, as the relator was advised, believed and charged, the right of the said Mayne to said office ceased and determined; that, after the relator, John Lee, had so been in the possession of his said office of director of said prison, and after said Murdock had so qualified as warden thereof, on the afternoon of the 12th day of March, 1879, the appellants Dykes and Baker, and the guards of said prison, by and under the direction of said Charles Mayne, forcibly excluded the said Lee, Wile and Hoover and the said Murdock from said prison, by locking them out of the prison and out of the walls thereof, the appellants Dykes and Baker being at the time within the walls of the prison, and at and within the entrance to the prison, and being surrounded by the prison guards, who had the keys to the prison, and who declared they were instructed by said

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Charles Mayne not to admit the said Lee, Wile, Hoover and Murdock within the walls of said prison; that afterward, on the 1st day of April, 1879, the said Lee and Hoover met as the board of directors of said prison, at the City of Indianapolis, upon the call of said Lee as the president of said board, all the members of said board having been duly notified of said meeting, and the said Simon Wile not attending that meeting, and thereupon the said John Lee presented an account for his services as director of said prison, from the 11th to the 31st days of March, 1879, both inclusive, for the sum of twenty-nine dollars and fifteen cents, the amount then due under the law prescribing the salary of his said office, which account was duly certified by said Murdock, as warden of said prison, and was, on said 1st day of April, 1879, duly allowed by said board of directors; that, on said 1st day of April, 1879, the said John Lee presented said account, so certified and allowed, to the appellant Manson, Auditor of State, at the office of said auditor, at the City of Indianapolis, and requested him, as such auditor, to audit said account and to draw his warrant therefor, in favor of said Lee, on the Treasurer of State, but that the appellant Manson then and since refused to audit the said account and to issue his warrant for the amount thereof, in favor of the appellee's relator, the said John Lee. A copy of said account, so certified and allowed, was set out at length in said verified complaint.

The appellee's relator further averred, that after the said board of directors had been organized by said Lee, Wile and Hoover, and after the said Luther, Dykes and Baker had been informed thereof, and after the said Luther, Dykes and Baker had ceased to be directors of said prison, as the relator was advised, believed and charged, the appellants Dykes and Baker, on the afternoon of the said 11th day of March, 1879, held a pretended meeting in some unusual place in said prison, in which they pre-

tended to act as a board of directors of said prison, and pretended to elect the said Charles Mayne warden of said prison, for the new term of four years from said 11th day of March, 1879; that the said Luther refused to participate in said action of said Dykes and Baker, in re-electing said Mayne, and retired from said office of director, declaring that his term of office had expired; that the said Charles Mayne claimed to have a title to said office of warden under said pretended election, for the said term of four years from said 11th day of March, 1879, and that the said Dykes and Baker falsely pretended that they were elected directors of said prison for the term of four years from said 11th day of March, 1877, and claimed that they were entitled to hold said offices for said term of four years, and until their successors were elected and qualified.

The relator further averred, that, after the organization of said board of directors, composed of said Lee, Wile and Hoover, on the 11th day of March, 1879, and before the election of said Murdock as warden, the name of said Charles Mayne was presented to said board as a candidate for re-election, with his knowledge and consent, and at the election of warden by said board he received one vote, to wit, the vote of said Wile, and failing to be elected by said board he recognized the said Dykes and Baker as being the board of directors of said prison and accepted an election at their hands, and afterward, on the 12th day of March, 1879, through the prison guards and in combination with the said Dykes and Baker, he excluded the said Lee, Wile and Hoover, and the said Murdock, by locking them out of the prison as aforesaid.

The relator further averred, that afterward, on the 1st day of April, 1879, the said Simon Wile joined the combination to extend the terms of office of the said Dykes and Baker as directors, and of the said Mayne as warden of said prison, and on the same day the said Dykes, Baker

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and Wile, at and within said prison, organized a pretended board of directors of said prison, by electing the said Wile president thereof, who was then acting as such president, and that the said Wile, Dykes and Baker then claimed to be the directors of said prison, to the exclusion of the said Lee and Hoover from the said offices. Wherefore, etc.

The first question presented by the appellants' counsel, as arising under the demurrer of the appellant Manson, is thus stated in the able and exhaustive brief of counsel, who claim to represent all the appellants: "Whether a mandate for the payment of a salary lies against an accounting officer of the state government, by one claiming an office and its salary, who is not in the possession of the office, and who admits that another is in possession thereof, discharging its duties and claiming its emoluments, and also whether the title to an office may be tried and determined in such a proceeding?" It is evident, we think, that the question stated could only arise under the demurrer of the appellant Manson, and could only be insisted on by him, and not by his co-appellants, Dykes and Baker. If we understand the answer of the appellant Manson, and the brief of the Attorney General in his behalf, "He wishes to waive any mere technicalities, and have the question as to who is entitled to receive the pay, as directors of the northern prison, fairly disposed of." The Attorney General has submitted the case to this court, "on behalf of the appellant Manson, with the statement that, having no interest in the case except to know his duty in issuing the warrant demanded, he awaits the order of the court in the premises." To the same effect, as we have seen, in the answer of the appellant Manson, he expressly disclaimed any interest whatever in this suit, except to see that his warrant for the salary of director of the northern prison was issued to the person entitled by law to re-

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ceive the same; and therefore he respectfully prayed the judgment and direction of the court below in the premises.

It is evident, we think, that the appellant Manson has no desire to present for our decision the foregoing questions; but that, on the contrary, his only wish in this case is, that this court will pass upon and finally determine the important questions presented by the record, as to what law governs the election of directors of the northern prison, and what is the duration of the terms of office of such directors? These latter questions are the only ones, as it seems to us, in this case, in which the appellants Dykes and Baker have or can have any possible interest. Certainly, they do not and can not have any interest whatever in the questions above quoted from the brief of their counsel; for, if it were conceded that the proceeding by mandate would not lie against the appellant Manson as an accounting officer of the State, under the circumstances stated in said questions, he alone could object to the proceedings on this ground, and could waive, as we think he has waived, in this case, any such objection.

The appellants Dykes and Baker claimed that the appellee's relator, John Lee, was not a director of the northern prison, and was not entitled to the salary of such a director. They did not deny that Lee, Wile and Hoover, had been elected, commissioned and qualified, as alleged in the relator's complaint; but they claimed, that they, the said Dykes and Baker, had been elected directors of said prison by the General Assembly of this State, at the regular session thereof in 1877, and that their terms of office as such directors would not expire until the 11th day of March, 1881, and that, until then, they were entitled to the salary of such directors to the exclusion of the appellee's relator. These were the grounds, upon which the appellants Dykes and Baker asked to be made defendants

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to the relator's suit; and we are bound to assume, that they came into this case for the express purpose of showing and establishing the fact, by the judgment of the court, that the relator was not a director of the northern prison, and this by reason of the further fact, that they, the said appellants, were such directors.

There is but little controversy between the appellee's relator and the appellants Dykes and Baker about the facts of this case. The question at issue between them is purely a question of law. The relator claimed, that all the directors of the northern prison had been elected by the General Assembly, under and pursuant to the provisions of an act entitled "An act to provide for the erection of a new prison north of the National Road, election of officers therefor, making appropriations, and for the regulation of the same," approved March 5th, 1859; that this act prescribed the number of such directors and the mode of their election, and provided that "Said directors shall hold their office for the term of two years, and until their successors are elected and qualified;" that at every regular session since the passage of said act, under its provisions, the General Assembly had elected three directors, who held their offices for the term of two years, and until their successors were elected and qualified; that accordingly, at the regular biennial session in 1877 of the Legislature, the appellants Dykes and Baker, and Charles B. Luther, were duly elected by the General Assembly, under the provisions of said act, as the three directors of said northern prison, and were duly commissioned by the Governor as such directors, for the term of two years from and after the 11th day of March, 1877, and were qualified as such directors, and, on said last named day, entered upon the discharge of their official duties; and that accordingly, also, the General Assembly, at the regular biennial session thereof, in 1879, elected the appellee's relator, John Lee,

and Frederick Hoover and Simon Wile, under the provisions of said act, as the directors of said prison, who were commissioned as such by the Governor for a term of two years from and after the 11th day of March, 1879, and who qualified as such directors before the day last named, and on that day organized as the board of directors of said prison, for the ensuing two years, but were afterward, on the next day, excluded from said prison by the persons in charge thereof, in combination with the appellants Dykes and Baker, who claimed that they had been elected such directors for the term of four years instead of two years, and that their terms of office would not expire until March 11th, 1881.

We do not understand that the appellants Dykes and Baker controvert or dispute the existence of any of the above recited facts. They claim, however, that the above entitled act, of March 5th, 1859, was passed merely for the temporary purpose of securing the erection of a new prison, which should be and was merely a branch of the old prison, which then and before that time was located at Jeffersonville, Indiana; that during the erection of such new prison, and until the same was fully completed, the directors thereof, as to the time and mode of their election and their terms of office, were to be and were governed and controlled by the provisions of the above entitled act; but that, as soon as the said new prison was fully erected and completed, to wit, on the 13th day of December, 1867, the above entitled act became inoperative, at least so far forth as the terms of office of the directors of said prison were concerned; and that thereafter the terms of office of said directors, as to the length thereof, were governed and controlled by the provisions of an act entitled "An act to provide for the government and discipline of the state-prison, and to repeal 'An act to provide for the government and discipline of the state-prison,'

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approved March 3, 1855, and all other laws or parts of laws inconsistent herewith," approved February 5th, 1857. It will be seen from the date of the approval of this latter act, that it became a law about two years prior to the passage of the act which provided for the erection of said new prison; and of course, therefore, it did not repeal, even by implication, any of the provisions of the later enactment.

The appellants Dykes and Baker found their claim to a four years' term of office, as we understand the argument of their learned counsel, upon the provisions of section 13 of the act of March 5th, 1859, which provided for the erection of a new prison, which section reads as follows:

"Sec. 13. All laws and regulations in force in reference to the government of the convicts, officers, and other matters in the present state-prison, be continued in force in reference to the management and control of this prison, as far as the same can be made applicable." 1 G. & H. 472.

It is earnestly insisted by the appellants' counsel, that, under and by force of this section, after the erection of the new prison, the directors thereof and their terms of office were thereafter to be and were governed and controlled by the laws and regulations in force in reference to the government of the old prison. It seems to us, however, that the language of this section is not open to any such construction. It will be seen that it is not provided that the laws and regulations governing the old prison should thereafter come in force, for the management and control of the new prison, upon the erection thereof or the happening of any other future event, but they were at once continued in force, as far as the same could be made applicable. It is very clear, we think, that the provisions of this section were not intended to and did not govern either the mode of election or the terms of office of the directors of the new prison; for these matters were

especially provided for in the 1st section of said act, under which the new prison was to be and was erected. This 1st section provided for the election, by a joint vote of the General Assembly, of three directors of the new prison, and that they should hold their offices for the term of two years, and until their successors were elected and qualified. 1 G. & H., p. 470. The true intent and meaning of said section 13, as we construe its provisions, were, that the laws and regulations of the old prison should be continued in force, as to all such necessary officers of the new prison, such as warden, clerk and others, for the management and control of the new prison, as were not mentioned in the act providing for the erection thereof; but, as to the directors of the new prison, the 1st section of said act fixed the mode of their election by the joint vote of the General Assembly, and limited their term of office to the term of two years, and until their successors were elected and qualified. We do not doubt, that all the directors of the new or northern prison have been lawfully elected under the provisions of the 1st section of the act of March 5th, 1859; nor do we doubt that their terms of office were lawfully limited, as they were expressly limited, in and by said section. This construction of the act is in strict accordance with the construction placed thereon by the action of each and every General Assembly during the last twenty years; for, at each biennial session thereof since the passage of said act, the General Assembly elected three directors of said prison, under the provisions of said act, each and all of whom were duly commissioned by the Governor, and held the office for the term of two years from and after the 11th day of March next succeeding their respective elections, and no longer.

We have now fully considered and decided the important questions presented in and by the record of this cause. It has seemed to us that those questions are pre-

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sented fairly, as to all the parties, by the record, and that they have been ably and elaborately discussed by the counsel of the respective parties to the cause. The interests of the parties, and, to some extent, the interests of the State, have alike demanded, we think, the decision of the main questions in the case, without regard to any merely technical questions. From our examination of the record, and with the purpose of deciding the leading and controlling questions in this cause, we have been led to the conclusion that there is no error in the record, of which the appellants Dykes and Baker can be heard to complain.

The judgment is affirmed, at the appellants' costs.

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CRIMINAL LAW.—Competency of Juror.—*Opinion formed from Newspaper Report.*—On the examination of jurors empanelled to try the defendant in a criminal prosecution, a juror answered that, from the evidence given on a former trial of the same prosecution, as reported in a newspaper and read by him, he had formed and expressed an opinion on the merits of the case, to change which would require some evidence, but which would readily yield thereto.

Held, that the juror was competent.

SAME.—Insanity.—Hypothetical Question.—Expert.—A hypothetical question, put to a medical expert to obtain his opinion as to the sanity of a defendant, must be based upon facts admitted, proved or assumed, but need not be based on all of such facts.

SAME.—Relative Strength of Presumptions of Sanity and Innocence.—Instruction.—An instruction stating that "the presumption of innocence is so far of greater strength than" the presumption "of sanity, that, when evidence appears tending to prove insanity, it compels the prosecution to establish, from all the evidence, mental soundness beyond a reasonable doubt," is erroneous, but can not be complained of by the defendant.

SAME.—Frenzy.—The defendant can not complain of an instruction stating that "Frenzy arising solely from the passions of anger and jealousy, no matter how furious, is not insanity." See opinion for instructions held correct.

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SAME.—Presumptions.—An instruction in such case stated that “the law presumes that a man is of sound mind, until there is some evidence to the contrary. * * * An accused is entitled to an acquittal, if the evidence engenders a reasonable doubt as to the mental capacity at the time the alleged offence is charged to have been committed. Evidence * tending to rebut the presumption of sanity need not, to entitle the defendant to an acquittal, preponderate in favor of the accused. It will be sufficient if it raises in your minds a reasonable doubt.”

Held, that the instruction was correct.

SAME.—Opinion of Medical Expert.—Weight of.—It was proper to instruct the jury, that, while they should consider the opinions of medical experts in connection with all the other evidence, they were not bound to act thereon to the exclusion of other testimony, but should determine the question of sanity from all the evidence. And that such an opinion “based upon a hypothesis” which is “wholly incorrectly assumed, or incorrect in its material facts to such an extent as to impair the value of the opinion, is of little or no weight.”

SAME.—Marion Criminal Circuit Court.—Constitutional Law.—The act establishing the Marion Criminal Circuit Court is constitutional.

From the Marion Criminal Circuit Court.

J. L. Griffiths, A. F. Potts, J. W. Gordon, R. N. Lamb and S. M. Shepard, for appellant.

T. W. Woollen, Attorney General, *J. B. Elam*, Prosecuting Attorney, *J. S. Duncan, C. W. Smith and R. B. Duncan*, for the State.

BIDDLE, J.—Louis Guetig was indicted for the murder of Mary McGlew, convicted, and sentenced to death. He appealed to this court. The judgment was reversed for an error in the lower court, and the cause remanded for a new trial. *Guetig v. The State*, 63 Ind. 278. Upon a second trial he was again convicted, and is now again under sentence of death. By appeal from the second judgment the appellant brings before us, for our decision, the following questions:

1. Errors committed by the court below in overruling defendant's challenge to each of three jurors, namely: Richard Hill, Thomas J. Hinesly and James E. Twiname;
2. Error committed by the court below in overruling

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the defendant's objection to the hypothetical cases stated, and question put thereon, to each of the medical expert witnesses called to testify in behalf of the State;

3. Error committed by the court below in overruling each of the instructions and charges moved and requested to be given by the court to the jury, by and on behalf of the defendant, and in refusing to give each of the same;

4. Errors committed by the court below in giving each of the several instructions and charges given by the court to the jury as and for the law of the case, when it was not the law, nor applicable to the case;

5. The transcript of the record of the proceedings and judgment of the court below do not show any authority in the Hon. Byron K. Elliott to hold said court, preside therein, or to try said defendant in said action; and,

6. There is no such court in the State of Indiana, and never was such court therein, as the Marion Criminal Circuit Court.

1. It is insisted that the court below erred in overruling the defendant's challenge to each of three jurors, namely: Richard Hill, Thomas J. Hinesly and James E. Twiname.

The examination of these jurors upon the *voire dire* is made part of the record by bill of exceptions, which makes substantially the following case against each:

1st. Richard Hill, who is admitted to be a fit juror, if his opinions did not disqualify him, when examined, stated that "he had heard of the case; but was not acquainted with defendant, or deceased, or her relations." He thought he first saw about the case in the Daily Sentinel; that it was simply an account of the occurrence in the papers that he read—an account of the former trial—what the parties had seen—the account set forth—the testimony of the witnesses; and he said "that he thought he probably did, from that information, form an opinion."

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It was thereupon objected to the juror that he was incompetent because he said that he had based an opinion upon the testimony of witnesses in the former trial.

He was thereupon examined, on behalf of the State, as follows:

"Is your opinion so fixed in your mind that it would not yield readily to the evidence introduced here, and so that you could not readily try the case as fairly and impartially as if you had never heard of it before?" To which he answered: "No; I can not say that it would. If the evidence should differ from what I have heard of it, I think I would have to be governed by the evidence."

By the Court: "Would it require any effort on your part to allow the evidence to govern your opinion?" Answer: "I do not think it would."

By Mr. Potts, for the defendant: "If the evidence should correspond to what you have heard, then I presume you would be governed by the original opinion you had formed?" Answer. "I think I should." "Would you, in regard to the question of guilt or innocence, and also in regard to the question of punishment to be inflicted upon the defendant in case of conviction?" Ans. "Well, it might have something to do with it." Ques. "In both cases?" Ans. "Yes, it might."

For the State: "But if it should differ from what you heard, then it would be as if you had never before heard of the case?" Ans. "I do not think but what it would require but very little evidence to turn my opinion."

"The defendant challenged the juror for cause, in that the said Hill was not competent to sit as a juror in the case, in that he had formed and expressed an opinion as to the guilt or innocence of the defendant, and could not try the case as impartially as if he had never heard of the case before."

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The challenge was overruled by the court, and the defendant at the time excepted.

2d. Thomas J. Hinesly, upon his examination on the *voire dire*, stated his name, and that he resided in Washington township, Marion county, Indiana, and had, for forty-three years; and, upon a general statement of the case to him, he had said, that "he had formed or expressed an opinion of the guilt or innocence of the defendant; that he had formed such an opinion from the papers. He then said he saw a report of the coroner's inquest, and a part of the report of the proceedings of the preceding trial here, in the Journal and People;" that "he formed an opinion as to what punishment should be inflicted if the defendant was guilty;" that "his opinion was so fixed in his mind, that it would require some evidence to remove it; yes, sir, it would;" that "he would not feel quite so free to try the case impartially and fairly, as he would if he had not heard of it;" and that "it would take some evidence to change his opinion in regard to the punishment to be inflicted. Yes."

By the State: "Would your mind yield readily to the evidence, or is your opinion fixed so that it would not readily yield?"

Defendants' counsel objected to the question on the ground that it was incompetent, in that it called for the witness' opinion, or rather the person's being examined, as to the effect that certain evidence would have on his mind, or would probably have on his mind. The objection was overruled by the court, to which ruling the defendant at the time excepted.

The juror answered: "It's not firmly fixed.

"You think you can sit here and try the case upon the law and the evidence as you should hear them in the court-room?"

"I think I can.

"You think the impression you now have upon your

mind would have no effect upon your final verdict, after having heard the law from the court, and the evidence from the witnesses?

"I think not."

By Major Gordon of defendant's counsel; "You think your opinion would not be any obstruction—in other words you would try to get rid of it?

"Yes, sir.

"But are you quite certain that you could do so?

"I think I could."

Thereupon the defendant interposed challenge for cause, upon the ground that said Hinesly is "incompetent as a juror in this case, by reason of his having formed and expressed an opinion in this case touching the guilt or innocence of the accused, which would be an obstruction to his mental operations, which it is impossible for either himself or the court to say that he can by any possible effort of the will rid himself of it."

The challenge was overruled by the court, to which ruling the defendant at the time excepted.

3d. James E. Twiname, one of the jurors, on his *voire dire*, answered substantially as follows: "He resided in the city, and had for seven years; expected he had formed or expressed an opinion of the guilt or innocence of Louis Guetig, the defendant, and thought it would require evidence to remove it." And in answer to the question, "You would not feel so impartial then between the State and defendant as if you had no opinion at all?" he said, "It would take some evidence to remove the opinion." Then the question: "And if the evidence ran in the same direction as your preconceived opinion, it would then require a little less evidence to convince your mind, would it not?" He said, "I do not know; I think I could try the case impartially." He had not been on a jury during the last twelve months. He was asked: "And, notwithstanding your opinion, you think you could try the case im-

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partially?" and answered, "My mind might possibly be a little biased."

"And, however just and impartial you might determine to be, there would be that much difference between your mind in its present state and the mind of a person who had never heard of the case, and who had never formed an opinion about it?" "That may be possible."

By the Court :

"Would the opinion of which you have spoken yield readily to the evidence as delivered by the witnesses, and could you, notwithstanding such opinion, give the defendant a fair and impartial trial?"

Question objected to by Major Gordon, because it asked for the juror's expression of opinion as to his mental condition, and his power to lay aside a preconceived opinion upon evidence to be heard.

Juror's answer: "I think I would let the evidence govern."

The defendant then challenged the juror as incompetent, in that he had formed and expressed an opinion in regard to the guilt or innocence of the defendant, which would require some evidence to remove it. The objection was overruled by the court, to which ruling the defendant at the time excepted.

The counsel for appellant base their objections to the competency of the above jurors mainly upon what they claim to be the fair interpretation of section 84 of the code of criminal pleading and practice. 2 R. S. 1876, p. 393.

It is in these words: "When the jurors are called, each may be examined on oath by either party, whether he has formed or expressed an opinion of the guilt or innocence of the defendant, and upon such examination and other questions put by leave, the court may determine upon the competency of the juror. Any juror is incompetent who

has formed or expressed an opinion of the guilt or innocence of the defendant."

They also insist that the authorities support their views.

The enactment of the code of 1831 upon this subject was as follows:

"Sec. 93. That on the trial of any person accused of any offence against the laws of this State, it shall be lawful for a defendant or the court, to require jurors to answer on oath, whether they have formed or expressed an opinion, relative to the guilt or innocence of such accused person, and from the answer to such question and to such others as may be asked by the permission of the court, the competency of such jurors shall be determined upon by the court." R. S. 1831, pp. 197, 198.

This section was re-enacted, in the same language, in the code of 1838. R. S. 1838, p. 222, sec. 93. It was also re-enacted in the code of 1843, R. S. 1843, p. 995, sec. 57, in substantially the same words.

It is contended that the last sentence of the section in the present code, namely, "Any juror is incompetent who has formed or expressed an opinion of the guilt or innocence of the defendant," was intended to express a different legislative meaning from that expressed in the previous sections; and that any opinion of the juror, however light or transient, concerning the guilt or innocence of the defendant, disqualifies him from trying the case. Under the codes of 1831, 1838 and 1843, it was uniformly held that an opinion formed by the juror as to the guilt or innocence of the defendant, from report or hearsay evidence, did not disqualify the juror. The first construction of section 84 in the present code was given by this court in the case of *Bradford v. The State*, 15 Ind. 347, in the following words: "In our opinion the proper construction to be placed upon this statute is, that, in ordinary cases, the par-

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ties must avail themselves of the right to examine and challenge jurors, either peremptorily or for cause; if for cause, the court, after hearing the examination, etc., exercises a sound legal discretion in determining as to the competency of the juror. One of the disabilities of a person called is the formation or expression of an opinion, etc. It is so declared by the statute. The legal doctrine thus embodied in the statute had always been acted upon in practice in this State. To determine whether the sound legal discretion vested in the judge, has been abused or properly exercised, we must, in each instance, examine the question whether the opinion of the person offered had been formed upon such information, or information derived from such a source, as would probably make such an impression as might influence him, after hearing the facts detailed on the trial. In determining this question, the court below, and this court, should be governed by the legal rules applicable in such case, and which have obtained in reference to like cases, before the enactment of the statute."

By this opinion, which has since been uniformly followed, it will be seen that the construction given to the section in the code of 1852 is not essentially different from that given to the sections in the previous codes; and we can not disturb this line of decisions. If the question were still open, we should probably adopt the same course. If we were to hold to the strict construction contended for on behalf of the appellant—in this age of progress, when, by the telegraph and the press, not only local news but every important event or fact which transpires throughout the world on one day is spread before millions of readers of this nation on the next morning, and when "good and lawful men," of which juries are composed, are all readers or listeners, and while the human mind is prone to form hypothetical opinions upon every charge or report or rumor, which may be varied or contradicted by a subse-

quent telegram or the succeeding issue of a newspaper—it would be impracticable to empanel a jury to try any case that attracted the public attention or was the theme of public news. It can not be held, therefore, that any or every light, transient or frivolous opinion, formed from the floating news of the day, which are often as changeable as the flying clouds, as to the guilt or innocence of a defendant, should render a juror incompetent to try his case. An opinion, to disqualify a juror, should be founded on what the juror supposes to be facts, and have such tenacity as would not readily yield to contrary evidence, and make such an impression upon the juror as would probably influence him after hearing the evidence in the case.

These rules apply only to honest and upright opinions. A pretended opinion, formed out of corrupt motives, for an ulterior purpose, or through ill-will toward the defendant, whatever ground or want of ground it might have or not have to rest upon, of course would be vicious, and render the juror incompetent.

In the case before us the qualified opinion of each juror objected to was formed upon hearsay evidence or newspaper reports, not upon facts known to the juror, and was evidently of a character that would readily yield to contrary evidence. It does not seem probable to us that it could have affected the opinion of the juror with all the evidence of the case before him. We can not say that the court exceeded a fair legal discretion in overruling the challenges for cause. The ruling, in our opinion, is fully sustained by the current of authorities. *McGregg v. The State*, 4 Blackf. 101; *Van Vacter v. McKillip*, 7 Blackf. 578; *Bradford v. The State*, 15 Ind. 347; *Fahnestock v. The State*, 23 Ind. 231; *Burk v. The State*, 27 Ind. 430; *Morgan v. The State*, 31 Ind. 193; *Clem v. The State*, 33 Ind. 418; *Cluck v. The State*, 40 Ind. 263; *Scranton v. Stewart*,

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52 Ind. 68; *Gillooley v. The State*, 58 Ind. 182; Moore's Criminal Law, sec. 301; *Hart v. The State*, 57 Ind. 102; *Coryell v. Stone*, 62 Ind. 307; *The State v. Benton*, 2 Dev. & Bat. 196; *Mann v. Glover*, 2 Green, N. J. 195.

2. The main defence of the appellee was insanity. After he had introduced his evidence in support of this defence, the State called a number of witnesses to rebut, among them several physicians, to whom, with a view to obtain their professional opinion as experts, the State propounded several hypothetical questions. The facts assumed as a basis of the questions fell fairly within the scope of the case, and were supported by evidence tending more or less strongly to prove them. This ruling is claimed to be erroneous. We do not think it was wrong. In such case the physician who was an expert might express his opinion as to the sanity or insanity of the defendant upon an admitted state of facts; or he might state facts within his knowledge as a witness, and express his opinion on them as an expert; or a state of facts falling within the case, supported in some degree by the evidence, might be assumed, upon which the witness, as an expert, might give his professional opinion; then, if the assumed facts are proved in the case, the statement of the opinion of the expert becomes evidence for the jury to consider, otherwise such opinion should not be considered; for, if the facts fail, the opinion based upon them must fail also. In stating a hypothetical case, it is not necessary to assume all the facts which the evidence tends to prove, as claimed on behalf of the appellant, but all the facts assumed must be supported by some evidence. The expert can not give his opinion upon evidence; it must be done upon admitted, proved or assumed facts. In our opinion the rulings of the court in this case are supported by the authorities. Moore's Criminal Law, secs. 31, 328; *Davis v. The State*, 35 Ind. 496; *Greenley v. The State*, 60 Ind. 141; 1 Wharton

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Crim. Law, secs. 50 *d*, 50 *e*, 50 *f*; *Regina v. Frances*, 4 Cox C. C. 57; *Negroes Jerry et al. v. Townshend*, 9 Md. 145; *Potts v. House*, 6 Ga. 324; *Clark v. The State*, 12 Ohio, 483; *The People v. Thurston*, 2 Parker C. C. 49; *Commonwealth v. Rogers*, 7 Met. 500; *Woodbury v. Obear*, 7 Gray, 467; *United States v. McGlue*, 1 Curtis C. C. 1; *McAllister v. The State*, 17 Ala. 484; *Rex v. Wright*, 1 Russ. & Ry. 456; *Lake v. The People*, 1 Parker C. C. 495; *The People v. Robinson*, 1 Parker C. C. 649; *Regina v. Southey*, 4 Fost. & F. 864; *White v. Bailey*, 10 Mich. 155; *Rex v. Offord*, 5 C. & P. 168; *Bishop v. Spining*, 38 Ind. 143.

3. The appellant complains of the refusal by the court to give several instructions to the jury, but the only one insisted upon in the brief, and the only one, therefore, which we shall notice, is the following :

“ 3. It is true, that, in the absence of any countervailing fact or presumption, every person is presumed to be of sound mind ; but in the case of the defendant, which you are now engaged in trying, there is opposed to the presumption of soundness of mind, the presumption that the defendant is innocent until the contrary is proved ; and this presumption of the innocence of the defendant countervails and overcomes the presumption that he was of sound mind ; and, in the absence of any evidence on the part of the State tending to prove that the defendant was of sound mind at the time of the homicide, you ought to find the defendant not guilty.”

This instruction was properly refused. We can not regard it as the law of the case. Besides, instructions numbered 8 and 9. given by the court, cover the entire ground attempted to be presented by instruction numbered 3, refused by the court.

4. The court gave to the jury the following instructions, to which exceptions were properly reserved :

“ 7. Frenzy arising solely from the passions of anger

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and jealousy, no matter how furious, is not insanity. A man with ordinary will power, which is unimpaired by disease, is required by law to govern and control his passions. If he yields to wicked passions, and purposely and maliciously slays another, he can not escape the penalty prescribed by law, upon the ground of mental incapacity. That state of mind caused by wicked and ungovernable passions, resulting not from mental lesion, but solely from evil passions, constitutes that mental condition which the law abhors and to which the term malice is applied. The condition of mind which usually and immediately follows the excessive use of alcoholic liquors, is not the unsoundness of mind meant by our law. Voluntary drunkenness does not even palliate or excuse.

"9. The law presumes that a man is of sound mind until there is some evidence to the contrary. In prosecutions for offences against the criminal code, an accused is entitled to an acquittal, if the evidence engenders a reasonable doubt as to the mental capacity at the time the alleged offence is charged to have been committed. Evidence rebutting or tending to rebut the presumption of sanity need not, to entitle the defendant to an acquittal, preponderate in favor of the accused. It will be sufficient if it raise in your minds a reasonable doubt.

"10. The presumption of innocence attends the accused step by step throughout the entire case, and he is entitled to its benefit upon every question involved, as well upon that of mental capacity as upon all others. The effect of the presumption of innocence upon the question of mental capacity is of such strength as to require that the evidence shall establish soundness of the mind beyond a reasonable doubt, but is not of such power as to require the State in the first instance, and before the introduction of evidence tending to show mental incapacity, to prove the mental capacity to have been in the normal condition

usually possessed by ordinary men. The presumption of innocence is so far of greater strength than that of sanity, that, when evidence appears tending to prove insanity, it compels the prosecution to establish, from all the evidence, mental soundness beyond a reasonable doubt.

“13. The opinions of medical experts are to be considered by you, in connection with all the other evidence in the case; but you are not bound to act upon them to the entire exclusion of other testimony. Taking into consideration these opinions, and giving them just weight, you are to determine for yourselves, from the whole evidence, whether the accused was or was not of sound mind, yielding him the benefit of a reasonable doubt, if such arises from the evidence.

“15. You are not to take for granted that the statements contained in the hypothetical questions which have been propounded to the witnesses are true. Upon the contrary, you are to carefully scrutinize the evidence, and from that determine, what, if any, of the averments, are true; and what, if any, are not true. Should you find from the evidence that some of the material statements therein contained are not correct, and that they are of such a character as to entirely destroy the reliability of opinions based upon the hypothesis stated, you may attach no weight whatever to the opinions based thereon. You are to determine, from all the evidence, what the real facts are, and whether they are correctly or not stated in the hypothetical question or questions. I need hardly remind you (for it will suggest itself to your own minds), that an opinion based upon an hypothesis wholly incorrectly assumed, or incorrect in its material facts, and to such an extent as to impair the value of the opinion, is of little or no weight. Upon the matters stated in these hypothetical questions, and which are involved in this investigation, you are to give the defendant the benefit of all reasonable

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doubt, if any there should be; and, where there is a reasonable doubt as to the truth of any one of the material facts stated, resolve it in the defendant's favor."

Counsel for appellant object particularly to the first sentence of instruction numbered 7. It is true, that that sentence does not state a legal proposition. It only says that "Frenzy arising solely from the passions of anger and jealousy, no matter how furious, is not insanity." This is, doubtless, correct. Frenzy arising from passion of any kind is violent and temporary, and would subside with the passion. Insanity may be without violence and permanent, and not in any way caused by passion. We think the sentence is harmless. It does not appear to us that it could possibly have injured the appellant.

It affords no ground, therefore, to reverse the judgment. The remainder of the instruction is correct; indeed, we do not understand the counsel as objecting to any part of it except the first sentence.

In our opinion instruction numbered 9 is so clearly right that we do not discuss it.

We can scarcely approve of the last sentence of instruction numbered 10; but it contains nothing of which the appellant can complain. If it is erroneous, the error is in his favor. It is true, that if the defendant introduced sufficient evidence to raise a reasonable doubt of his soundness of mind, it then would become necessary for the State, if she insisted upon a conviction, to prove the defendant's mental soundness beyond a reasonable doubt; but there may be evidence tending to prove insanity, and not be sufficiently strong to raise a reasonable doubt of mental soundness. In this we think the proposition is incorrect. But the error, being against the State, the appellant is not injured thereby. The remaining portion of the instruction is correct.

Instruction numbered 13 and 15 properly express the

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law, and are fully sustained by the authorities cited under question numbered 2, already discussed.

5. We understood the counsel for the appellant to waive question numbered 5. We think very properly. It does not appear that any such question was raised in the court below, and, if not, of course could not be considered here.

6. But it is insisted finally that the Marion Criminal Circuit Court, in which the appellant was tried, and from which he appeals to this court, has no legal existence, for want of constitutional authority in the Legislature to create it.

This question has been settled so frequently by this court, against the views of the learned counsel, that we must consider it no longer open for our consideration. *Case v. The State*, 5 Ind. 1; *Shattuck v. The State*, 11 Ind. 473; *Combs v. The State*, 26 Ind. 98; *Anderson v. The State*, 28 Ind. 22; *Eitel v. The State*, 33 Ind. 201; *Weis v. The State*, 33 Ind. 204; *Ex Parte Wiley*, 39 Ind. 546; *Cropsey v. Henderson*, 63 Ind. 268.

We have thus carefully examined all the questions presented for our consideration on behalf of the appellant. There is nothing in the record to show us that the appellant was not indicted, tried and convicted according to the law and the facts of the case.

The judgment is therefore affirmed, at the costs of the appellant.

 SITHIN V. THE BOARD OF COMMISSIONERS OF SHELBY COUNTY.

SOLDIERS' BOUNTIES.—*Order by County Commissioners not lawfully in Session.*—*Curative Act.*—*Constitutional Law.*—By the 1st section of the act of March 3d, 1865, 3 Ind. Stat., p. 565, legalizing the acts of boards of county commissioners in issuing bonds and making appropriations to pay

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142	364
66	109
152	217
153	218
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155	149

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bounties to volunteers in the war of 1861. orders made by a board of county commissioners, though not lawfully in session, offering bounties to volunteers to be credited on the quota required of the county. were made valid, and a volunteer thereafter enlisted and properly credited to such county may compel payment of the bounty so offered.

SAME.—Interest.—Demand.—Interest is recoverable in such action, on the amount of the bounty offered, from the date of a demand duly made for the bounty.

SAME.—Statute of Limitations.—Answer.—The basis of such action being the order of record, offering the bounty, an answer of the statute of limitations of six years is insufficient.

SAME.—Payment to Third Person.—Notice.—An answer alleging that the bounty offered had been paid to other volunteers than the plaintiff, being the full quota of the county, without notice of his enlistment, but not averring the enlistment of the plaintiff to have been after the quota had been filled, is insufficient.

SAME.—Voluntary Enlistment in Ignorance of Offer.—The fact that the plaintiff was ignorant of the fact that such a bounty had been offered, until after his enlistment, does not discharge the county.

From the Shelby Circuit Court.

A. L. Roache and *E. H. Lamme*, for appellant.

A. Blair, *E. P. Ferris* and *W. W. Spencer*, for appellee.

WORDEN, C. J.—Complaint by the appellant, against the appellee, to recover the amount of a bounty offered by the defendant to volunteers enlisting in the military service of the United States in the war of the late Rebellion, to supply the quota allotted to the county of Shelby. The orders of the board offering the bounty need not be here stated, as they will afterward appear in this opinion in stating the facts found by the court; nor, for the same reason, need the facts alleged in the complaint be here more fully stated.

The defendant answered:

1. By general denial.
2. The statute of limitations of six years.
3. In substance, that the board made the order bearing date November 2d, 1863, and that under that order forty-nine men proved to the satisfaction of the auditor that they were entitled to the provisions of the order, and

received from the defendant the one hundred dollars offered by the board ; and that, after the order of December 17th, 1863, set out in the complaint, was made, two hundred and five men, in addition to the forty-nine men above stated, appeared before the auditor of Shelby county, Indiana, and proved to his satisfaction that they had enlisted and were credited to Shelby county, Indiana, and each of them received the two hundred dollars provided for in the order of the last mentioned date ; that this money was all paid by the defendant before it had any notice of plaintiff's enlistment, and before plaintiff had made any application for payment ; and that no other bonds, orders or evidence of indebtedness, etc., were ever afterward issued to the plaintiff, or any one else for that purpose, and it prays judgment.

4. In substance, that the plaintiff voluntarily enlisted, without any knowledge of the orders set out in the complaint until long after he enlisted and was credited to Shelby county, Indiana ; and that, before the defendant knew of the plaintiff's enlistment, and that he had been credited to Shelby county, Indiana, it had paid out and issued all the funds provided in each of said orders to persons to the number of two hundred and fifty-four, who had satisfied the county auditor of Shelby county, Indiana, that they had enlisted and had been credited to said Shelby county, under the order aforesaid ; and that no orders or bonds or other evidence of indebtedness were ever issued to the plaintiff or any other person, under either of said orders, etc. Wherefore, etc.

5. In substance, that the orders of the board set out in the complaint were made without authority of law ; and that, neither prior to the 3d day of March, 1865, nor afterward, had the defendant issued any bonds, orders or other evidence of indebtedness to the plaintiff, or any other person or persons, to pay bounties to volunteers or drafted

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men who have entered the military service of the United States, etc.; and that no subsequent order has ever been made ratifying the orders set out in the complaint; and that the orders aforesaid are not within the act legalizing the action of the board of county commissioners in that regard, approved March 3d, 1865. Wherefore, etc.

Demurrers for want of sufficient facts were sustained respectively to the several paragraphs of answer except the first, the general denial, and the defendant excepted. The cause was submitted to the court for trial, who, at the request of the parties, made a special finding of the facts, and stated his conclusions of law thereon, as follows:

"On the 2d day of November, 1863, James J. Curtis, Henry Buck and John McConnell, then the acting commissioners of Shelby county, met at the court-house in the city of Shelbyville, Indiana, and the following is a full and complete transcript of the record and proceedings of said board, as the same appear of record on page 246 of the commissioners' record of said county called E of the records of said board, which is as follows, to wit: 'At a called session of the Board of Commissioners of Shelby county, Indiana, began and held at the court-house in Shelbyville on Monday the 2d day of November, A. D. 1863,—Present, the Honorables James J. Curtis, Henry Buck and John McConnell, Commissioners.

"“Whereas, at a meeting of the citizens of Shelby county, Indiana, held at the court-house in the city of Shelbyville, the following proceedings were had, to wit:

"“Whereas the President of the United States has made a requisition upon the Governors of the loyal States for three hundred thousand volunteers, and whereas the quota allotted to Shelby county under said call is two hundred and fifty-four men; now, therefore, resolved that the county commissioners are hereby requested to offer a bounty for the purpose of facilitating volunteering, and that a tax be levied upon the taxable property of the county to pay

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the same; and be it further resolved, that the proposed bounty shall be in any sum in the discretion of the Board of Commissioners, not less than one hundred dollars."

"Wherefore it is ordered by the board that a bounty of one hundred dollars be paid to each and every volunteer, to fill up the quota of Shelby county under the last call of the President of the United States, so soon as said volunteer shall be mustered and sworn into the service of the United States. And the board now adjourns.

"Commissioners, { HENRY BUCK,
JOHN McCONNELL,
JAMES J. CURTIS."

"That no evidence was introduced showing how or in what manner the board came together, whether by notice from the auditor, clerk or recorder, or upon their own motion; that, in the absence of any evidence to the contrary, I conclude that they came together upon their own motion and not in pursuance to notice as provided in 'An act providing for called special sessions of Boards of County Commissioners.'

"That the limit of the term of the commissioner's court in Shelby county, under section 6, p. 351, of Statutes of Indiana (Davis), entitled 'An act providing for the organization of county boards, and prescribing some of their powers and duties,' approved June 17th, 1852, was and is a term of nine days.

"That the said board met in regular session on the first Monday of December, A. D. 1863, the same being the 7th day of December, and continued in session each day of that week until Saturday, when they adjourned over until Tuesday morning, December 15th, 1863, when they met and transacted business on Tuesday and Wednesday, and upon their own motion adjourned over until Thursday morning, December 17th, without any call from competent authority calling them together, and upon

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Thursday, while thus in session, they made the order last named in the complaint. The opening and adjourning orders for each day, and the full and complete record of proceedings upon Thursday, December 17th, 1863, making the order in question, are as follows, as copied from the commissioners' record: 'At a term of the Court of Commissioners of Shelby county, in the State of Indiana, began and held at the court-house in Shelbyville, in the county and State aforesaid, on Monday, the 7th day of December, A. D. 1863. Present, the Hons. Henry Buck, John McConnell, James J. Curtis, Commissioners. The board now adjourn until Tuesday morning at nine o'clock A. M., on account of the death of the wife of S. L. Vanpelt, Auditor.

"Tuesday morning, nine o'clock, December 8th, 1863. Present, same board as yesterday, and the board now adjourn until nine o'clock to-morrow morning.

(Signed,)

"HENRY BUCK,

"JOHN McCONNELL,

"JAMES J. CURTIS.

"Wednesday morning, nine o'clock, December 9th, A. D. 1863. Court in session pursuant to adjournment. Present, the Hons. Henry Buck, John McConnell, James J. Curtis, Commissioners. And the board now adjourn until nine o'clock to-morrow morning.

(Signed,)

"HENRY BUCK,

"JAMES J. CURTIS,

"JOHN McCONNELL.

"Thursday morning, nine o'clock, December 10th, A. D. 1863. Court in session pursuant to adjournment. Present, the Hons. Henry Buck, John McConnell, James J. Curtis, Commissioners. And the board now adjourn until nine o'clock to-morrow morning.

(Signed,)

"HENRY BUCK,

"JOHN McCONNELL,

"JAMES J. CURTIS.

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“‘Friday morning, nine o’clock, December 11th, A. D. 1863. Court in session pursuant to adjournment. Present, Hons. Henry Buck, John McConnell, James J. Curtis, Commissioners. And the board now adjourn till nine o’clock to-morrow morning.

(Signed,) “‘ HENRY BUCK,
“‘ JOHN McCONNELL,
“‘ JAMES J. CURTIS.

“‘Saturday morning, nine o’clock, December 12th, A. D. 1863. Court in session pursuant to adjournment. Present, Hons. Henry Buck, John McConnell, James J. Curtis, Commissioners. And the board now adjourn until nine o’clock Tuesday morning, December 15th, 1863.

(Signed,) “‘ HENRY BUCK,
“‘ JOHN McCONNELL,
“‘ JAMES J. CURTIS.

“‘Tuesday morning, nine o’clock, December 15th, A. D. 1863. Court in session pursuant to adjournment. Present, Hons. Henry Buck, John McConnell, James J. Curtis, Commissioners. And the board now adjourns until nine o’clock to-morrow morning.

(Signed,) “‘ HENRY BUCK,
“‘ JOHN McCONNELL,
“‘ JAMES J. CURTIS.

“‘Wednesday morning, nine o’clock, December 16th, A. D. 1863. Court in session pursuant to adjournment. Present, Hons. Henry Buck, John McConnell, James J. Curtis, Commissioners. And the board now adjourn till to-morrow morning at nine o’clock.

(Signed,) “‘ HENRY BUCK,
“‘ JOHN McCONNELL,
“‘ JAMES J. CURTIS.

“‘Thursday morning, nine o’clock, December 17th, A. D. 1863. Court in session pursuant to adjournment. Present, Hons. Henry Buck, John McConnell, James J. Curtis, Commissioners.

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“ ‘In the matter of the petition of sundry citizens of Shelby county for the increase of bounty offered to volunteers. Now at this time comes Thomas A. McFarland and files the following petition, to wit :

“ ‘ ‘To the Honorable Board of Commissioners of Shelby County :

“ ‘ ‘The undersigned, citizens of Shelby county, would respectfully recommend to your honorable board that they believe that it is important and necessary that an additional bounty of one hundred dollars be offered to volunteers to fill Shelby county’s quota under the last call of the President, making bounty in all two hundred dollars, whereby a number, in our judgment, will volunteer that otherwise would not, and save men to our credit in the quota of the county, that will leave and volunteer in adjoining counties that are paying larger bounties than is offered in Shelby county ; believing that an emergency exists for immediate action in this matter, and that it is only necessary for you to be advised of the same, and that you will promptly respond. For which your petitioners will ever pray, etc.

(Signed,)

“ ‘ ‘ALEXANDER CORY,

“ ‘ ‘ALFRED MAJOR,

“ ‘ ‘JOHN ELLIOTT,

“ ‘ ‘And 290 others.”

“ ‘And said petition being read, and the board being sufficiently advised, do now consider it expedient, for the purpose of encouraging volunteering, to offer a bounty of one hundred dollars, in addition to the one offered by this board on the 2d day of November, A. D. 1863.

“ ‘Therefore it is ordered by the Board, that each and every volunteer, volunteering under the last call of the President of the United States to fill Shelby county’s quota, to the number not exceeding two hundred, be allowed and paid the sum of one hundred dol-

lars in addition to the one hundred dollars heretofore allowed by this board, to be paid in a county bond of Shelby county, Indiana, payable in two years and bearing interest at the rate of six per cent. per annum from date of issuing: *Provided*, however, that all volunteers that have received a bounty of one hundred dollars from the several townships that have offered a bounty in addition to the one offered by this board November 2d, 1863, be not allowed additional bounty offered by this board.

“And it is further ordered by the board that the township that has paid a bounty of one hundred dollars in addition to the bounty of one hundred dollars offered November 2d, 1863, by this board, have the same refunded by Shelby county.

“And it is further ordered, that two hundred and fifty-four county bonds be issued in the sum of one hundred dollars each, to be placed in the hands of the auditor, to be dated by him at the date called for, and to be by him delivered to all volunteers under the last call of the President of the United States upon their producing the proper certificate of the mustering officer that they have been regularly mustered into the United States' service.

“Ordered by the board, that the auditor be and he is hereby authorized to issue, to each and every volunteer to fill the quota of Shelby county under the last call of the President of the United States, a county order for the sum of one hundred dollars for bounty offered by this board November 2d, 1863, upon such volunteer filing with said auditor the proper certificate of the mustering officer, that he was regularly mustered into the United States' service: *Provided*, however, that no order be issued to such volunteers as have already received such order. Said orders, to be issued are not to exceed in number two hundred and five (205). And the board was adjourned until nine o'clock to-morrow morning.

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(Signed,)

“HENRY BUCK,

“JOHN McCONNELL,

“JAMES J. CURTIS.’

“That on the 1st day of January, 1864, the plaintiff, while at Indianola, Texas, having served a term in the army, re-enlisted in Co. K. 18th Indiana Volunteers, in the war of the Rebellion and was credited to Jackson township, Shelby county, Indiana.

“That a short time previous to the 1st day of January, 1864, the colonel of the regiment to which plaintiff belonged read, in the presence of the plaintiff and command an article from a Shelbyville paper, stating that this bounty had been offered. The plaintiff returned home about the 9th of July, 1864, and in a short time presented himself to S. L. Vanpelt, the then acting Auditor of Shelby county, and asked him if there was a bounty paid in for him; to which Vanpelt asked what regiment he belonged to, and the plaintiff informed him he belonged to Co. K. 18th Indiana volunteers; to which Vanpelt said there was nothing for him that he knew of.

“A few days before this action was commenced, Mr. Lamme appeared before the Board of Commissioners and demanded for Jesse Sithin, the plaintiff, the sum of two hundred dollars claimed to be due plaintiff upon the foregoing order, which sum the commissioners refused to pay, and this action was brought to recover upon the two orders above set out.

“I deduce the following conclusions of law, as applicable to the foregoing facts:

“1. The action of the Board of Commissioners on the 2d day of November, 1863, without being part of a regular session or called together pursuant to statute in special session, they were not authorized to act or make the order in question, and the defendant is not estopped to repudiate the pretended action of the board and are not bound thereby.

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"2. The term of commissioners' court in Shelby county, being limited to nine days, means nine consecutive days, excluding Sunday, and upon Wednesday, December 16th, 1863, the term of the court had expired by limitation, being the full nine days, and the adjournment of the court to Thursday morning, December 17th, 1863, upon motion of the court, was illegal, unauthorized, and the order made upon that day was absolutely void and not binding upon the defendant.

"Upon the foregoing facts and conclusions of law I find for the defendant.

"To each conclusion of law the plaintiff at the time excepts and objects."

We are of the opinion that the court below erred in its conclusions of law upon the facts found.

The orders of the board of commissioners offering the bounty may have been void at the time they were made, for want of power in the board to make them. But the 1st section of the act of March 3d, 1865, Acts 1865, p. 126, provides, "That all bonds or orders heretofore issued, or appropriations made, by and under the authority of the boards of commissioners of the several counties of this State, and the incorporated cities and towns thereof, for the purpose of procuring or furnishing volunteers and drafted men for the army or navy of the United States, or for maintaining the families of volunteers, soldiers, substitutes or drafted men, or otherwise to aid the government in suppressing the Rebellion, be, and the same are hereby, ratified, affirmed and legalized."

This act, it has been held, legalizes and validates such orders previously made by boards of commissioners. *Nave v. King*, 27 Ind. 356; *Coffman v. Keightley*, 24 Ind. 509; *The Board of Commissioners of Miami County v. Bearss*, 25 Ind. 110; *King v. Course*, 25 Ind. 202; *Miller v. The Board of Commissioners of Putnam County*, 29 Ind. 75;

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The Board of Commissioners of Fulton County v. Onstott,
29 Ind. 384.

There are many other cases running through our reports, not necessary to be collected here, which go upon the theory that the act of March 3d, 1865, above cited, legalizes and makes valid such orders of boards of commissioners made before the passage of the act.

The act has thus been held valid as legalizing the orders of boards, which they had no power, even when in regular session, to make. And if the statute thus supplies the want of power and makes valid such orders made without power, much more should it supply any defect as to the regularity or legality of the sessions of the boards when such orders were made. The purpose of the statute was, as we think, to legalize and make valid such orders, whether the invalidity consisted in a want of authority to make them, or in the want of legality in the sessions of the boards when they were made.

At the time the orders were made the country was engaged in a gigantic war, and calls had been made for the supply of a large military force.

As was said by Judge ELLIOTT, in the case of *The Board of Commissioners of Fulton County v. Onstott*, *supra* :

“The necessities of the public service were pressingly urgent, and required the utmost promptness in bringing into service the required number of troops.”

It is well known, as matter of public history, that in many cases, owing to the urgency of the occasion, boards of commissioners were irregularly convened, and that in others they sat beyond the time prescribed by law, and at such times made orders, the object of which was “to aid the government in suppressing the Rebellion;” and we think it was the purpose of the Legislature, in the passage of the act of March 3d, 1865, to cure all such defects in the action of the boards, as well as to obviate the objection of want of power in the boards to make such orders.

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There can be no doubt of the power of the Legislature to cure, by subsequent act, any defect growing out of the fact that the orders of the board were made at a time when it was not in legal session.

Thus, in *Walpole v. Elliott*, 18 Ind. 258, it was held that the Legislature might, by a curative act, validate the proceedings of a term of court holden without authority of law. See, also, *Price v. Huey*, 22 Ind. 18.

The following principle is stated in Cooley's Constitutional Limitations, p. 371 :

"The rule applicable to cases of this description is substantially the following: If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the Legislature might have dispensed with by a prior statute, then it is not beyond the power of the Legislature to dispense with it by a subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act which the Legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law."

We are of opinion that the act of the Legislature made good and valid the orders of the board of commissioners offering the bounty, and that the plaintiff was entitled to judgment on the finding of the court for the sum of two hundred dollars, and the interest thereon from the demand in July, 1864.

The appellee has assigned cross errors upon the ruling of the court in sustaining the demurrers to the second, third, fourth and fifth paragraphs of its answer, which we proceed to consider.

The second paragraph was clearly bad. The basis of the action was the written contract contained in the orders of the board offering the bounty. See *The Board of Commissioners of Adams County v. Mertz*, 27 Ind. 103; *The Board*

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of *Commissioners of Monroe County v. Wood*, 39 Ind. 345.

The action was, therefore, not barred in six years.

The third was also bad. The plaintiff was entitled to the bounty offered unless he enlisted after the required number had enlisted, and this is not averred in the paragraph. When the plaintiff enlisted and was credited to the county in pursuance of the offered bounty, the required number not having then been supplied, he became entitled to the offered bounty. *The Board of Commissioners of Monroe County v. Wood, supra*; *The Board of Commissioners of Fulton County v. Onstott, supra*.

The county can not be discharged of its obligation to the plaintiff because of having paid out to others the full amount of the bounties offered, before notice to its officers of the plaintiff's claim.

What we have said in reference to the third applies also to the fourth paragraph of answer, except the allegation therein that the plaintiff voluntarily enlisted without any knowledge of the orders set out in the complaint until long after he enlisted and was credited to Shelby county, Indiana.

The case of *The Board of Commissioners of Monroe County v. Wood, supra*, and the authorities there cited, show that the allegation of want of knowledge, on the part of the plaintiff, of the offering of the bounty at the time of his enlistment, does not make the pleading good.

The fifth paragraph of the answer is palpably bad. It sets up no matter of *fact* which can avoid the liability of the county to pay the offered bounty.

The judgment below is reversed, with costs, and the cause remanded to the court below, with instructions to render judgment for the plaintiff, on the finding, for the sum of two hundred dollars, with the interest thereon as hereinbefore indicated.

Petition for a rehearing overruled.

Forgey et al. v. The First National Bank of Cambridge City.

FORGEY ET AL. v. THE FIRST NATIONAL BANK OF CAMBRIDGE CITY.

PROMISSORY NOTE.—Non Est Factum.—Order of Introducing Evidence.—

In an action on a promissory note, by the payee, against the makers as principals, wherein one of the latter made default and the others answered *non est factum*, it was not error to allow the plaintiff to put the note in evidence before giving evidence of its execution.

SAME.—Expert.—Proof of Handwriting, by Comparison.—The opinion of an expert, as to whether the signature attached to a note is genuine, formed by comparing the same with a signature which the maker admits to be his, is competent evidence to prove the execution of the note.

SAME.—Competency of Expert.—Weight of Evidence.—The court trying a cause must determine the competency of a witness to testify as an expert, but it is for the jury to determine the weight of such evidence.

SAME.—Instruction to find for Codefendant.—Principal and Surety.—An instruction to the jury trying such action, that the plaintiff had failed to make out a case against certain of the defendants, and directing a verdict for them, though erroneous, yet, if the relation of principal and surety be not shown by the record, it is an error which is not available to a codefendant against whom a verdict is found.

SAME.—Contribution.—Former Adjudication.—Such defendant, if obliged to pay the judgment, can enforce contribution from such codefendants, if principals, in a subsequent action.

SAME.—“Testimony” and “Evidence” Used Interchangeably.—Where, on such trial, the only written evidence was the promissory note, the use of the words “testimony” and “evidence” interchangeably, in an instruction as to the conflict of testimony, is harmless.

SAME.—Objection to Form of Judgment.—Practice.—If the form of a judgment is unsatisfactory to a party, he must make a motion to modify it, to reserve any question thereon.

From the Hancock Circuit Court.

W. R. Hough, for appellants.

M. Marsh and J. H. Mellett, for appellee.

PERKINS, J.—Suit by the appellee, upon a promissory note, of which William S. Wood, Marion Forgey, Thomas Wood and W. L. Garriott, appeared to be the makers, and by which they appeared to promise to pay the appellee four thousand dollars. Wm. S. Wood had deceased before the suit was instituted, and his administrators were made de-

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135	465
66	123
142	09
66	123
144	643
145	320
66	123
150	655

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fendants. They suffered judgment against them by default.

Marion Forgey, Thomas Wood and W. L. Garriott severally answered *non est factum*.

Upon the issues, the jury found against Marion Forgey, and in favor of Wood and Garriott. Forgey moved for a new trial, his motion was overruled, and judgment was rendered against him. He appealed to this court, the other defendants, the administrators, declining to join in the appeal. He has assigned for error that the court erred in overruling his motion for a new trial.

No cross assignment of error is made.

Nine reasons were stated for the granting of the motion for a new trial.

We will notice such as are relied on by counsel for appellant.

1. That the circuit court permitted the promissory note sued on to be given in evidence before its execution was proved.

It was necessary to a recovery on the note, under the issue in the cause made by Forgey, that it should be given in evidence and its execution *prima facie* proved. *Collins v. Maghee*, 32 Ind. 268.

Naturally, the execution of the note should first have been proved; but "The order of time for the introduction of evidence to support the different parts of an action or defence, must be generally left to the discretion of the party who introduces the evidence." *Throgmorton v. Davis*, 4 Blackf. 174. *Hadden v. Johnson*, 7 Ind. 394; *Ginn v. Collins*, 43 Ind. 271. See *Taylor v. Gay*, 6 Blackf. 150.

2. That the circuit court permitted Wm. W. Woollen and J. Ward Walker to testify as experts, upon a comparison of the handwriting of the signature to the note in suit, with specimens of Forgey's signature admitted to be genuine, and to give their opinions upon such comparison, as to the genuineness of the signature to the note.

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Formerly, such testimony was inadmissible. *Clark v. Wyatt*, 15 Ind. 271.

Such testimony is now admissible. *Chance v. The Indianapolis, etc., Gravel Road Co*, 32 Ind. 472. But the witnesses giving it must be experts, that is, persons experienced in judging of handwriting; and, of the competency of those offered to testify as experts, the court trying the cause is the judge.

Mr. Woollon had been managing a bank sixteen years, and had made the signatures to paper a study for twenty-five years, and considered himself competent to judge of the genuineness of paper, etc. J. Ward Walker had been cashier of the Greenfield Bank for the last five years; could judge, to his own satisfaction, as to the genuineness of paper, by comparison of signatures, but might make a mistake; and, we may ask, what witness might not?

We are satisfied these witnesses were competent to testify. The weight of their testimony was for the jury. Walker, it may be observed, did not rely, for his opinion, on the comparison alone. He had some acquaintance with the handwriting of Forgey. *Humphries v. Johnson*, 20 Ind. 190; *Chance v. The Indianapolis, etc., Gravel Road Co.*, 32 Ind. 472.

We find no test laid down by which we can determine, with mathematical precision, just how much experience a witness must have had, how expert, in short, he must be, to render him competent to testify as an expert. The following cases in our own reports may be consulted on this subject: *Burdick v. Hunt*, 43 Ind. 381; *Huston v. Schindler*, 46 Ind. 38; *Davis v. The State*, 35 Ind. 496; *House v. Fort*, 4 Blackf. 293; *The Jeffersonville R. R. Co. v. Lanham*, 27 Ind. 171; *Blizzard v. Applegate*, 61 Ind. 368; *The Louisville, etc., R. W. Co. v. Spain*, 61 Ind. 460; *Hinds v. Harbou*, 58 Ind. 121; *Eggers v. Eggers*, 57 Ind. 461. See, also, *McEwen v. Bigelow*, 40 Mich. 215, where the court, by

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COOLEY, J., says the court must exercise a fair discretion in the admission of witnesses as experts.

The next point made by appellants' counsel is, that "the court erred in each of its instructions to the jury."

We copy those on which any question can arise:

"1. The plaintiff is entitled to a verdict in this case against the estate of William S. Wood, deceased.

"2. The plaintiff has not made out a case against Thomas Wood or William L. Garriott; your verdict, therefore, will be for them.

"3. To entitle the plaintiff to a verdict against Marion Forgey, it must have been proved by a preponderance of evidence, that Marion Forgey signed the note in suit. And, if the plaintiff has made such proof, it should have a verdict against him; if such proof has not been made, your verdict should be in his favor.

"4. If there is a conflict in the testimony, it is your duty to take such a view of the evidence as will enable you to believe all the witnesses, if that can be done; but, if it can not, then it is your province to believe such of the witnesses as, under all the circumstances, you think entitled to belief, and disbelieve such as you think least entitled to credit, and, in determining the weight you will give to the testimony of a witness, you should consider his manner of testifying, and conduct while on the witness stand, his opportunity of knowing the facts about which he testifies, the reasonableness or unreasonableness of the matters which he testifies to, his willingness and readiness, or reluctance and hesitancy, in answering questions, and all circumstances that will enable you to determine the weight to be given to the testimony."

The remaining instructions are formal, and need not be copied.

No objection is urged to the first instruction.

The second directs the jury to find in favor of Wood and Garriott, because the evidence made no case against

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either of them. It is contended that this instruction was erroneous as to Wood, and that Forgey may avail himself of the error, because Wood is a co-surety and would be bound to contribute if held liable. We may say that the judgment against Forgey appears by the record to have been clearly right and cannot be reversed. We incline to the opinion that there was a very small amount of evidence tending to prove that Thomas Wood signed the note sued on, though the weight of evidence was so great in his favor, that a jury would probably never find, upon it, a verdict against him. Properly, however, the court should not have given the second instruction, so far as it related to the case of said Wood. *Steinmetz v. Wingate*, 42 Ind. 574.

The plaintiff, it will be observed, against whom the instruction directly operated, takes no exception to it. But if circumstances might have been presented by the record which would have authorized Forgey to take advantage of the said error, such circumstances are not thus presented.

The suit in this case was upon a promissory note against all the parties to it as principals. The administrator of William S. Wood, deceased, made default. The other defendants, being Marion Forgey, Thomas Wood and W. L. Garriott, severally answered *non est factum*. These issues of *non est factum* were the only issues presented for trial in the cause. The question of principal and surety, as between any of said parties, was not made. *Laval v. Rowley*, 17 Ind. 36; *Watson v. Beabout*, 18 Ind. 291. For aught that appears, Forgey may have been principal in the note. If so, Thomas Wood, if a surety, as counsel assert, would not be liable to him for contribution, even if his signature to the note was genuine. Again, it is said by counsel that Wm. S. Wood was the principal in the note. Judgment went against his administrators by default. If it shall be shown, as it may be hereafter (2 R. S. 1876, p. 276, sec. 672,

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et seq.), that said W. S. Wood was principal, his estate may pay the debt so as to relieve all sureties.

It is plain, that no case is made on the statement of counsel, as to the relation of the parties, wherein Forgey has a right to claim, in his behalf, the benefit of errors committed in trying the issue between the plaintiff below and Thomas Wood. It is not shown that he is injured by such errors. Besides, if said Forgey should have to pay the judgment, he might recover contribution from Wood, if a principal. *Harvey v. Osborn*, 55 Ind. 535.

It is objected to the fourth instruction, that the court uses the words "testimony" and "evidence" interchangeably, without calling the attention of the jury to the difference in their signification. In this case the evidence was all testimony except the note.

We think, therefore, that the jury could not have been confused and misled by the interchange of these terms in the instruction, in making proper application of it.

If the form of the judgment rendered was unsatisfactory, a motion to modify, etc., should have been made below. *Baker v. Horsey*, 21 Ind. 246; *Wilkerson v. Rust*, 57 Ind. 172. No such motion was made.

We think no error appears in the record, for which the judgment should be reversed.

Affirmed, with costs.

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86	128
149	487
66	128
159	20

PARTITION.—*Complaint.*—*Review of Judgment.*—*Blank.*—A petition for partition alleged, that on the — day of —, —, a certain person died intestate, seized in fee-simple of a tract of land particularly described, leaving the petitioner and certain of the defendants named, his children, and the remaining defendant named, his widow, surviving him, and averring that the children were equal owners thereof, subject to an alleged life-estate in one-third, in the widow.

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Held, on demurrer to a complaint to review the judgment and proceedings in such partition suit, that the petition for partition was sufficient.

SAME.—*Failure of Guardian ad Litem to Answer.*—The fact that a guardian *ad litem*, appointed in such partition proceeding, for an infant defendant, failed to file any answer as such, is not ground for review by an adult defendant.

SAME.—*Appearance.*—*Process.*—*Waiver.*—Where an adult defendant, on the sheriff's return of served "by copy," was defaulted, an appearance by such defendant to object to the report of sale of the lands in question, without a subsequent withdrawal of such appearance, amounted to an appearance in full to the action, and was a waiver of proper service.

SAME.—*Interlocutory Order of Partition.*—An interlocutory order appointing commissioners to make partition, without any particular finding that partition should be made, though informal, was sufficient.

SAME.—*Appraisement.*—*Notice of Sale.*—*Waiver.*—A statement in the commissioner's report of sale, that the sum for which the land was sold exceeded two-thirds of its appraised value, justifies the inference that the land had been properly appraised, and, no objection having been made on that ground, or on the ground that too much time had elapsed between the notice of sale and the sale, those irregularities were waived.

SAME.—*Name.*—Appearance by a defendant properly served, without objecting that he is sued by a name other than his own, waives objection on that account.

From the Switzerland Circuit Court.

T. Livings, for appellant.

J. A. Works, J. D. Works, F. Adkinson and W. D. Ward, for appellees.

NIBLACK, J.—In this case it is shown, that, on the 3d day of October, 1871, Timothy McCarty filed in the Switzerland Circuit Court his petition against Catharine McCarty, Joseph McCarty and Mary McCarty, alleging that one Jeremiah McCarty had died seized in fee-simple of a certain forty-acre tract of land in Switzerland county, and left the said Mary McCarty as his widow, and the said Timothy, Catharine and Joseph as his only children, surviving him; that the said Mary was, as such widow, entitled to one-third part of said tract of land during her natural life, and that the said Timothy, Catharine and

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Joseph were each the owners of one undivided third part of said land, subject to said widow's interest, and praying partition of said tract of land amongst the parties according to their respective interests therein.

At the next term of said court a default was entered against the said Mary and Joseph McCarty, and William R. Johnston was appointed guardian *ad litem* for the said Catharine, who was a minor, and ruled to answer. The summons issued in the cause was returned as follows:

"Served, as commanded, by reading to and in hearing of Catharine McCarty and Joseph McCarty, October 9th, 1871; served on Mary McCarty, by copy, same day.

"MATTHEW WORSTELL,

"Sheriff of Switzerland County,

"By T. P. WORSTELL, Deputy."

Johnston, as such guardian *ad litem*, afterward appeared to the action, and, a jury being waived, an order was made appointing commissioners to make partition between the parties, according to their respective interests as set forth in the plaintiff's petition.

These commissioners afterward reported that the land was not susceptible of partition without damage to the owners, and a commissioner was appointed to make sale of the land, so that the proceeds might be divided between the parties according to their respective interests. This latter commissioner in due time reported that he had sold the land to one John DeHart for the "sum of twelve hundred dollars, that being more than two-thirds of the appraised value of said real estate," which report was approved by the court, and, the record says, "To which approval the said Mary McCarty excepts in all things."

The record also informs us that the following further proceedings were had:

"Come the parties, and the court orders, that, after the payment of costs herein, the money paid into the hands of the clerk of this court, at the March term, 1873, shall be

distributed as follows: To Mary McCarty, the widow, one-sixth, and the remainder to be divided equally between Timothy McCarty, the plaintiff, and the defendants Joseph McCarty and Catharine McCarty."

This action was brought by the above named widow, under the name of Mary McCarthy, to review the proceedings above set forth.

A demurrer was sustained to the complaint, and there was final judgment upon demurrer, from which this appeal is prosecuted.

Numerous objections are urged to the proceedings sought to be reviewed, but we think they may be fairly transposed and stated as follows:

1. That the complaint was insufficient to authorize or support the proceedings had upon it;
2. That no answer was filed by Johnston, as guardian *ad litem* for Catharine McCarty, to the petition for partition;
3. That the return to the summons did not authorize a default to be taken against the appellant;
4. That there was no proper interlocutory order of partition;
5. That it was error to confirm the report of sale of the land, because there was no appraisement of the land before it was sold;
6. That it was also error to confirm the report of sale, because it was shown by the report that the land was not sold until thirteen days after the last notice was given;
7. That the appellant was described in all the proceedings by the name of McCarty, when her true name was McCarthy.

We will consider the objections in the order stated as above.

1. Very singularly, as it appears to us, a blank was left in the day, month and year, in the averment in the complaint as to the time of Jeremiah McCarty's death, but

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the complaint gave a description of the land, of which partition was desired, and set forth the rights and titles therein of the parties respectively. That we regard as a substantial compliance with the statute. 2 R. S. 1876, p. 344, sec. 2. The facts being given in a petition for partition, the court can judge whether the parties are joint tenants, tenants in common, or tenants in coparcenary.

2. The appellant alleges nothing showing that she was injured in any way by the failure of Johnston to file an answer as guardian *ad litem* of her codefendant Catharine McCarty. We therefore see no cause that she has to complain of such failure. Catharine has since intermarried with one John DeHart and no complaint is made by her, or on her behalf.

3. In our opinion the record of the partition suit shows an appearance by the appellant to the action, at the time the report of sale was acted upon and approved by the court. Her appearance as there stated was a waiver of any objection she might have made to the return of the sheriff to the summons.

4. The interlocutory order was not as formal in all respects as it might have been, but no substantial objection to it is pointed out and we see none.

5. We think the language used in the report of sale justified the inference that the land had been appraised before it was sold, and as the appellant is shown to have appeared to that report, without having excepted to it for want of an appraisement, she must be held to have waived any right she might otherwise have had to review of the proceedings, if in fact there was no appraisement.

The appellant, having appeared to the action when the report of sale was made, must be regarded as having been present during the subsequent proceedings—her appearance not having been afterward withdrawn—and as the order for the distribution of the proceeds, set out as

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above, does not represent her as having made any objection to the final disposition of the cause, she must now be considered as having acquiesced in any irregularity there may have been, if any, concerning the appraisement of the land.

6. For reasons similar to those just given, we are not required to consider the objection to the sale arising out of the alleged lapse of time between the last notice and the time of the sale.

7. We need not inquire whether, for some purposes, there may not be a material difference between the names of McCarthy and McCarty. The appearance to the action by the appellant, without objection to the name by which she was sued, was a waiver of any subsequent objection for that cause. In that connection see sec. 100, 2 R. S. 1876, p. 83, which provides for the substitution of the correct name when a party is sued by the wrong name. No sufficient reason has been shown for a reversal of the judgment.

The judgment is affirmed, at the appellant's costs.

DOHERTY v. FARNSLEY, ADMINISTRATOR.

PLEADING.—Promissory Note.—Endorsement of.—Surplusage.—Indemnity Mortgage.—Record.—In an action on a promissory note, and to foreclose a mortgage, the complaint counted on a mortgage executed by the defendant to A., to indemnify A. against loss as endorser of a promissory note, and all renewals thereof, executed by the defendant to A. The complaint alleged that the note in suit was a renewal of the note described in the mortgage, and that A., by the title of A., "Guardian," etc., had endorsed the same to the plaintiff, and that it remained due and unpaid.

Held, on demurrer, that the additional title in such endorsement was surplusage, that no separate question is presented by the record as to the mortgage, and, the defendant being personally liable on the note, that the complaint is sufficient.

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From the Floyd Circuit Court.

J. V. Kelso and *J. H. Stotsenburg*, for appellant.

S. K. Wolfe, for appellee.

WORDEN, C. J.—This was an action by the appellee, against the appellant, upon a note and to foreclose a mortgage executed by the defendant, Doherty, to one Joshua P. Farnsley.

Demurrer to the complaint for want of sufficient facts overruled, and exception. Final judgment for the plaintiff.

The question made here is whether the complaint states facts sufficient to constitute a cause of action.

The mortgage, as has been said, was executed by Doherty to Joshua P. Farnsley, and was given, in its own language, "to secure said Joshua P. Farnsley as endorser on a note for the sum of four thousand dollars, executed by said John Doherty, March 24th, 1869, and payable to the order of said Joshua P. Farnsley, four months after the date thereof, at the Bank of Salem, at New Albany, without relief from valuation or appraisement laws, and to secure said Joshua P. Farnsley as endorser on all notes, bills of exchange, or other evidence of indebtedness given in renewal of the said first above described note. If said John Doherty pays said note, and all notes and bills of exchange given in renewal thereof as above specified, this mortgage to be void, else to remain in full force and virtue in law."

It is averred in the complaint, that, "On the 22d day of May, 1877, there remained due and unpaid on the note specified in said mortgage, the sum of twenty-three hundred and six dollars and thirty-one cents; and, on said day, the defendant renewed said note, and, by the name of J. Doherty, executed to said Joshua P. Farnsley his, defendant's, renewed note of that date, by which he promised to pay, one day after date, to the order of Joshua P. Farnsley, by the name of J. P. Farnsley, twenty-three hundred and

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six dollars and thirty-one cents, for value received, without any relief from valuation or appraisement laws, with six per cent. interest per annum. Afterward, to wit, on the 7th day of September, 1877, the said Joshua P. Farnsley, by the name and description of 'J. P. Farnsley, guardian of Joseph Farnsley,' by his written endorsement on said note, assigned the same to the plaintiff by the description of 'Administrator of Joseph Farnsley, deceased.' * * * Plaintiff avers that the money specified in said note, with a large amount of interest thereon, is now due and unpaid. Wherefore he demands judgment," etc. A copy of the last mentioned note is set out, together with the endorsement thereon to the plaintiff.

The court rendered a personal judgment against the defendant, on the note, and also for the foreclosure of the mortgage.

We are of opinion that the court below committed no error in overruling the demurrer to the complaint. The complaint, it seems to us, clearly stated a good cause of action against the defendant upon the note last mentioned. He was personally liable upon that note to the plaintiff, whether the plaintiff had a right to foreclose the mortgage or otherwise. The case upon the note is simply this: The defendant executed his note to Joshua P. Farnsley for the sum of twenty-three hundred and six dollars and thirty-one cents, and the latter endorsed it to the plaintiff. The note is due and unpaid. The description which Joshua P. Farnsley gave himself in the endorsement may, we think, be regarded as surplusage. The plaintiff, being thus the legal holder of the note, was entitled to maintain an action upon it.

With regard to the mortgage, it may be observed that it seems to have been intended as a mere indemnity to Joshua P. Farnsley, and it is difficult to see how it could be rightfully foreclosed until he had been compelled to

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pay or had paid something, as the endorser of the paper mentioned in the mortgage. But upon this point we decide nothing, as the question is in no way raised by the record. The only question raised is whether the complaint stated a good cause of action.

The judgment below is affirmed, with costs.

NOTE.—Howk, J., was absent when this cause was considered.

THE TOWN OF ELKHART v. RITTER.

NEGLIGENCE.—Complaint against Town for Injuries resulting from a fall into Excavation in Street.—Notice.—In an action against a town, to recover damages for an injury received by the plaintiff by a fall into an excavation in a sidewalk of a public street of said town, the complaint alleged that the defendant had “negligently permitted such excavation to be made;” that it was “so situated as to prevent pedestrians from passing along the said sidewalk * without turning out into” the street; that said excavation was upon a street “most used by the public, * and was by the defendant so negligently and carelessly allowed to remain, several days prior to said accident, without any proper or sufficient guards, lights, notices or railings *; that, at the date of said accident, the plaintiff resided in said town, and was engaged in daily labor, by which she gained her support; * ” that in the evening, about dark, she attempted to pass along said street, when, “without fault or negligence on her part, she fell into said excavation, and was thereby greatly injured, both externally and internally, disabled to labor, put to great expense,” etc.

Held, on demurrer, that the complaint is sufficient.

Held, also, that the clear inference from the facts alleged is that the defendant had notice of the excavation, and of its condition, but that no such notice to the plaintiff can be inferred.

SAME.—Answer.—Natural Causes Producing Excavation.—The facts alleged in an answer in such action, that, during the making of a lawful excavation by a third person, the sidewalk had given away because of a “thaw,” on the day of the accident, were admissible under the general denial, and therefore the sustaining of a demurrer to such answer was harmless.

SAME.—Evidence.—Natural Consequences of Injury.—The evidence on the trial of such action showing that the plaintiff had sprained a limb, and

66	136
127	556
66	136
133	47
66	136
141	569
66	136
145	151
66	136
157	417

66	136
160	603
66	136
163	372

66	136
167	92

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been injured internally, by such fall, and that, prior thereto, the officers of the defendant had actual notice of the dangerous condition of such excavation, the plaintiff had a right to give evidence of the effect upon her that actually and naturally followed the injury, as a consequence thereof.

SAME.—*Damages for Permanent Injury.*—The plaintiff in such action was entitled, on evidence that the injury was permanent, to recover for prospective as well as past damages.

SAME.—*Occupation of Injured Person.*—It was competent in such action for the plaintiff to give evidence of her occupation, and the effect of the injury as affecting her ability to continue in such occupation.

SAME.—*Declarations Indicating Pain.*—Complaints by the plaintiff, of pain caused by the injury, were also competent evidence.

SAME.—*Town Liable for Act of Third Person.*—It is the duty of a town to keep its public streets and alleys in a safe condition for ordinary use as such, and the fact that they are rendered unsafe by the act of a third person, without license from the town, is no defence to an action for an injury caused by such act.

SAME.—*Presumption.*—*Notice.*—A traveller using a public street in the ordinary manner, without knowledge that it is defective, has a right to presume that it is in safe condition; but if he have notice of the defect, and does not use ordinary care to avoid injury therefrom, the town is not liable.

From the Elkhart Circuit Court.

J. H. Baker and J. A. S. Mitchell, for appellant.

J. D. Osborn, R. M. Johnson and E. G. Herr, for appellee.

PERKINS, J.—Lydia Ritter sued the town of Elkhart, to recover damages occasioned to her by a fall into a pit in the sidewalk of one of the most public streets of said town, viz., Jackson street. She alleged that the town negligently permitted an excavation to be made in said sidewalk, about ten feet wide, eight feet deep and sixty feet in length, “and so situated as to prevent pedestrians from passing along the said sidewalk of said street without turning out into that portion of said street usually devoted to wheeled vehicles; that said excavation was upon one of the streets of said town most used by the public for ordinary business purposes; and was by the defendant so negligently and carelessly allowed to remain, several days prior to said accident, without any proper or sufficient guards, lights, notices or railings to warn people and prevent them falling there-

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in; that, at the date of said accident (about March 13th, 1873), the plaintiff resided in said town and was engaged in daily labor, by which she gained her support, and upon which she was dependent for such support; that, about seven o'clock in the evening of said day, it then being nearly or quite dark, she attempted to pass along the south side of said Jackson street, toward the corner of Main street, when, without fault or negligence on her part, she fell into said excavation, and was thereby greatly injured, both externally and internally, disabled to labor, put to great expense," etc., and she claims damages in the sum of two thousand dollars.

Demurrer to the complaint, as not showing a cause of action, overruled, and exception entered.

Answer in four paragraphs:

1. That said defendant denies notice or knowledge of said excavation.

2. "That said street and sidewalk were excavated and dug up by one McNaughton, without the knowledge and consent of this defendant, and that defendant had no means nor funds, nor the control of any, to repair said street and sidewalk, and no way to raise any means or funds, under the law, to make such repairs; wherefore it did not and could not make them.

3. That said defendant "admits that there was an excavation made on a certain street, in the town of Elkhart, at the place mentioned in said complaint, and admits that said plaintiff fell into the same and was thereby injured as alleged; but the said town avers that she gave her consent to one John McNaughton to dig out a stair-way to the basement of the brick store on the south-west corner of Main and Jackson streets; that said McNaughton undertook and promised to make and protect said excavation carefully and skilfully; that said McNaughton caused and procured the said excavation to be covered up and securely protected, but, the frost unexpectedly coming out of the

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ground and the earth thereby becoming loosened, the said walk, and the earth thereunder gave way and sunk, on the same day as that on which the alleged injury occurred, and the plaintiff fell into the said hole or excavation so made by said earth giving away, as aforesaid. Wherefore," etc.

4. The general denial.

The plaintiff moved that the first, second and third paragraphs of answer be struck out, which motion was overruled as to the first and second and sustained as to the third; exceptions. A demurrer was then filed to the first and second paragraphs of the answer, which was sustained, and exception entered. Trial by jury. Verdict for plaintiff for five hundred dollars, and judgment, over a motion for a new trial, on the verdict. Exception. This was in April, 1875. On the 30th of April, 1877, the record on appeal to the Supreme Court was filed, on which errors as follows were assigned:

1. Overruling the demurrer to the complaint;
2. Sustaining the motion to strike out the third paragraph of the answer;
3. Overruling the motion for a new trial.

The complaint might have been subject to a motion for greater certainty, but it was sufficient on demurrer. 2 R. S. 1876, p. 79, sec. 90, and notes; *Scudder v. Crossan*, 43 Ind. 343; *Wiles v. Lambert*, post, p. 494.

The complaint is good under the decision in *The City of Fort Wayne v. De Witt*, 47 Ind. 391. See *Higert v. The City of Greencastle*, 43 Ind. 574. It states facts from which the clear inference is that the town had knowledge of the excavation and its condition, while no such inference can arise, as to knowledge on the part of the plaintiff. The town is alleged to have a population of about five thousand inhabitants, and, while it appears that the plaintiff was a resident of the town, it is not shown in what part of it she resided, and, being an employee at daily labor, upon which she depended

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for support, no inference arises that she had knowledge of the condition of the excavation or of the excavation itself; while the decisions are, that, where the averment is made, as in this case, that the plaintiff was without fault, the facts alleged must, to overcome that allegation, show very clearly its falsity. *The City of Fort Wayne v. De Witt, supra.*

As to the second error assigned, it may be said, that, if it was irregular to strike out the third paragraph of answer (*Clark v. The Jeffersonville, etc., R.R.Co.*, 44 Ind. 248), still the action of the court was harmless, as all the matters of defence alleged in said third paragraph were admissible in evidence under the general denial. Besides, that paragraph did not deny notice to the defendant of the caving in of the earth.

The grounds for a new trial will all be presented in considering and deciding upon the instructions given and refused on the trial of the cause.

Counsel, in their brief, make no objection to the instructions given by the court of its own motion. They complain of the refusal of the court to give the second, third, ninth, tenth and eleventh instructions asked by the defendant.

The third instruction asked was properly refused. It asked the court to say to the jury that the complaint did not show notice of the excavation to the city. We have already decided that it did.

We need not set out the ninth, tenth and eleventh in full. What we shall say in the remaining part of this opinion will dispose of them all.

There was evidence in the cause that the plaintiff fell into an excavation in the sidewalk mentioned in the complaint, near eight o'clock, on a dark evening; that said excavation was about five feet wide, forty feet long and four feet deep; that it was in a dangerous condition and known to the officers of the town to be so; that they had actual no-

tice of the caving in of earth mentioned, by two or three o'clock P. M., on the day of the evening the accident happened, but caused no guards or protection from danger to be placed over or about it, and there was no evidence that the plaintiff had any notice of the character or condition of the excavation; there was evidence that the fall caused a badly sprained ankle and internal injury; that the appellee vomited blood on the night of the injury after the injury occurred; that she suffered from the sprained ankle and the internal injury continuously for months, etc.

We now state some legal propositions:

1. "The complaint charged that the plaintiff was grievously bruised, hurt, and injured" (internally and externally). "Under these general allegations, the plaintiff was entitled to prove any and all injuries which he received, and which were the natural consequence of the wrongful act of the appellant. * * The specific averments of injury did not limit and restrict" evidence "to the specific injuries charged." *The Ohio, etc., R. W. Co. v. Selby*, 47 Ind. 471, on p. 497. In the case at bar, we may remark, the internal injury was actually caused by the wrongful act of the defendant, as much as was the sprained ankle, and on the trial the plaintiff had a right to show the effect upon her that actually and naturally followed that injury, as a consequence of it.

2. "A person injured by a defective highway can bring but one action for the damages, and, where the injury is permanent" (or continuous in its effects) "may recover prospective as well as past damages." *Weisenberg v. The City of Appleton*, 26 Wis. 56. 2 Greenl. Ev., 18th ed., sec. 89, and cases cited in note 3.

3. In such action "evidence showing the business in which the plaintiff was engaged, its extent and the consequent loss arising to him from his inability to prosecute it, is relevant and pertinent, as enabling the jury to fix, with some certainty, the direct and

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necessary damages resulting from his injuries." *Nebraska City v. Campbell*, 2 Black, 590. Greenleaf Ev., *supra*; *The City of Indianapolis v. Gaston*, 58 Ind. 224.

4. Complaints of the injured party of pain, soreness, etc., may be competent evidence in his or her own behalf. *Werely v. Persons*, 28 N. Y. 344. The plaintiff in that case gave evidence tending to show that the immediate effect of the violence to his person was to produce a pain in the plaintiff's side. Soon after, the plaintiff left the defendant's house to go to his father's, and as he walked away he held his side, etc. The next day he went to one Cherritree's to work, and remained for two months, and while there slept with one Geeley. The plaintiff was allowed to prove by Geeley, notwithstanding the defendant's objection, that during the entire two months he complained of his right side, etc.

"The only question in the case," says ROSEKRANS, J., in delivering his opinion, "is whether this testimony was properly admitted. And that question seems to have been determined by this court in the case of *Caldwell v. Murphy*, 1 Kern. 416. * * This testimony was of the same nature as that given in the case under consideration. * * Phillipps says, in his treatise on Evidence, (vol. 1, 182, Edw. ed.) the representations of a patient to his medical attendant, who has an opportunity of observing whether they correspond with the symptoms to which they refer, appear to be entitled to greater weight than if made to an inexperienced person, and to afford stronger presumption that they are genuine; but that they are admissible in evidence, though made to another not a medical attendant. Greenleaf lays down the same, (1 Greenl. Ev., sec. 102,) and both of these authors say that when it is material to enquire as to the bodily or mental feelings of a party, the usual expressions of such feelings, made at the time in question, are in the nature of original evidence."

SELDEN, J., in the same case, said: "The declarations in this case are a little more remote than in the previous cases, and the circumstances are such as to throw more doubt upon their sincerity, but their remoteness was not such as to furnish ground for their exclusion. I think it entirely safe to leave the question to the jury in all such cases, whether any and what credit shall be given to such declarations." All the Judges concurred.

5. It is the duty of a town to keep its public streets and alleys in a safe condition for use, in the usual modes, by travellers; and it is no defence to a suit for such injury, that such defect was caused by a third person, without the consent of the town; but such third person might be liable over to the town. *The Town of Centerville v. Woods*, 57 Ind. 192; *The City of Aurora v. Colshire*, 55 Ind. 484.

The above legal propositions and authorities clearly vindicate the action of the court in refusing to give the ninth, tenth and eleventh instructions asked by the defendant.

The second instruction asked and refused follows:

"If a person knows there is an obstruction in a street, to pass the place, when in consequence of the darkness of night he cannot see the obstruction, he has no reason to complain of the injury he may receive on the occasion; he takes the risk in such case upon himself."

This instruction the court refused to give, and, in lieu of it, gave the following:

"If the plaintiff knew that the defendant or others were making or had made an excavation where the injury was received, then the law would require more care on her part to avoid injury than if she knew nothing about it. When a person knows of an excavation, the law requires of him to exercise such reasonable care as an ordinarily prudent and cautious person would use under like circumstances; and, if this is done and an injury results, the person is without fault."

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Counsel cite in support of the instruction as asked and refused, *The President, etc., v. Dusouchett*, 2 Ind. 586. The court in that case laid down the proposition embodied substantially in the refused instruction, on the following facts (we quote from the opinion of the court): "We do not think this third count is sustainable. It alleges that the plaintiff had given the defendants notice to remove the boiler. That is virtually alleging that the plaintiffs knew the situation of the boiler before the rise of the river. Taking all the allegations together into consideration, and considering also that if there is any incongruity between them the construction must be taken most strongly against the pleader, the count must be viewed as showing that the plaintiffs had sufficient knowledge of the place of the boiler to enable them to avoid exposing their boat to any danger from it. With that knowledge, the plaintiffs took the boat over that part of the street where the boiler lay, and kept the boat there in the night-time until, on account of the fall of the water, the boat settled down upon the boiler.

"Those facts show that the plaintiffs have no cause of action. If a person knows," etc. And, in the case of *Butterfield v. Forrester*, 11 East, 60, it is said: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right."
* * One person being in fault will not dispense with another's using ordinary care for himself."

In the case at bar, the plaintiff did not throw herself upon an obstruction, or into a pit, the precise location and condition of which she had knowledge, without due care, etc. She had no knowledge of the condition of the sidewalk, and had a right to presume that the town had done its duty in putting it in safe condition. See *Waters v. Wing*, 59 Pa. State, 211, and *The City of Indianapolis v. Gaston*,

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supra. As applicable to the facts of this case, the instruction asked was not law. See *The Wayne County Turnpike Co. v. Berry*, 5 Ind. 286.

The damages given by the jury in the case were light.

We find no error in the record, for which the judgment should be reversed.

Affirmed, with costs.

REYNOLDS ET AL. v. SPENCER.

MORTGAGE.—Description of Premises.—Promissory Note.—Who may Object to Uncertainty.—In an action against A., B. and C., on a promissory note executed by A. and B. to the plaintiff, and to foreclose a mortgage on real estate executed by B. and C. to the plaintiff, to secure the payment of such note, the complaint and mortgage described the mortgaged premises by metes and bounds in a certain section, etc., and as being “otherwise described as Lot No. 6 in said section.”

Held, on demurrer by A., that, even if the description were void, he can not object thereto, but that the description is sufficiently certain against B. and C.

From the White Circuit Court.

A. W. Reynolds and E. B. Sellers, for appellants.

C. H. Test, J. Coburn and E. E. Bassett, for appellee.

Howk, J.—This was a suit by the appellee, to foreclose a mortgage, and to collect the note secured thereby. The note was executed by Daniel D. Dale and the appellant Reynolds, to the order of the appellee; and the mortgage was executed to the appellee by said Dale and his wife, on certain real estate in White county, Indiana. The appellant Reynolds, and said Dale and his wife, jointly demurred to the appellee’s complaint, for the alleged insufficiency of the facts therein to constitute a cause of action, which de-

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murrer was overruled by the court, and to this ruling the defendants jointly excepted.

The appellant Reynolds and his codefendants, Dale and his wife, then jointly answered in three paragraphs, of which the first was a general denial, and the second and third paragraphs set up affirmative matters by way of defence. The appellee replied in two paragraphs, putting the cause at issue. The cause was tried by the court, and a finding was made for the appellee, for the full amount due on the note, and for the foreclosure of the mortgage in suit.

The joint motions of the defendants for a new trial and in arrest of judgment having been severally overruled, and their exceptions entered to these decisions, judgment was rendered by the court on its finding, from which judgment the appellant Reynolds alone has appealed to this court.

He has here assigned, as errors, the several decisions of the court below, in overruling the demurrer to appellee's complaint, and the motions for a new trial and in arrest of judgment.

The only point made by the appellants' counsel in their argument of this case in this court is, that the mortgage in suit was void on its face, for uncertainty in the description of the mortgaged premises. If this position of counsel were well taken, we fail to see in what manner the appellant would or could be benefited thereby. He was not a party to the mortgage and was not sued thereon. He was sued on the note, which he executed; and if it were conceded that the mortgage was void for uncertainty in the description of the mortgaged premises, it would not follow, by any means, that the note in suit was also void. There was neither vagueness nor uncertainty in the terms of the note; it provided for the payment to the appellee of a sum certain, at a certain time, and these are the essential requisites of a valid, legal and binding promissory note.

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We do not think, however, that there was any such uncertainty in the description of the mortgaged premises as would vitiate or avoid the mortgage in suit, even as against the Dales, the mortgagors. The premises are described by metes and bounds, in a certain quarter of a certain section, in White county, Indiana, "otherwise described as Lot No. 6 in said section." It seems to us, that the description is sufficiently certain and specific, and, if it is defective in any particular, the defect is not apparent.

We find no error in the record.

The judgment is affirmed, at the appellants' costs.

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REPLEVIN.—Answer.—Chattels levied on by Officer.—In an action of replevin, the defendant answered that he was a constable, and as such had levied executions on the property in question "as the property of" an execution defendant, but there was no averment that the property belonged to such execution defendant, nor that it was subject to levy on such executions.

Held, on demurrer, that the answer is bad.

SAME.—Chattel Mortgage.—Equity of Redemption subject to Execution.—The equity of redemption of property covered by a chattel mortgage is subject to execution, and therefore the mortgagee can not replevy the same from an officer who, while they are in the possession of the mortgagor pursuant to the terms of the mortgage, has levied on them for sale on an execution against the mortgagor.

Howe, J., dissents.

From the Clay Circuit Court.

W. P. Blair, S. W. Curtis and — Holliday, for appellant.
G. A. Knight and C. H. Knight, for appellee.

BIDDLE, J.—Complaint by the appellee, against the appellant, to recover the possession of personal property. The appellant answered by a general denial and a special paragraph. Demurrer to special paragraph, for want of

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facts, sustained. Trial by the court and finding for appellee. By a motion for a new trial and his assignments of error, the appellant presents two questions for our consideration :

1. The sufficiency of the second paragraph of answer;
2. The sufficiency of the evidence to sustain the verdict.
1. The sufficiency of the second paragraph of answer.

The facts in brief, as stated in this paragraph, are as follows :

That the defendant was a constable; that he had then several executions in his hands for service, in favor of the three several plaintiffs, but all against the goods and chattels of "The Otter Creek Block Coal Company;" that, as commanded by said writs, he levied upon the property described in the complaint, and took possession of the same, as the property of the said "Otter Creek Block Coal Company," and that the appellee replevied the same.

The defect in this paragraph is that it nowhere avers that the property in controversy belonged to "Otter Creek Block Coal Company," and was subject to execution. The demurrer to it was properly sustained.

2. The sufficiency of the evidence to sustain the verdict.

The appellee, to sustain his case at the trial, introduced a chattel mortgage executed by "The Otter Creek Block Coal Company" to himself, to secure to him the payment of three several promissory notes, with the usual condition, that, upon breach by the mortgagor, the mortgagee should have possession of the goods "for his own use forever," contemplating that the goods should remain in possession of the mortgagor until breach. He also introduced evidence tending to show a breach of the condition of the mortgage by the non-payment of the notes secured thereby, as stipulated therein.

The appellant introduced as evidence three several exe-

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cutions issued to him as constable on judgments against "The Otter Creek Block Coal Company," and the levy made on the property in suit, in pursuance of the command of the writs, as the property of said company.

Other evidence as to value, etc., was introduced.

The question is thus presented, which party had the right of possession of the property at the time the suit was commenced, the appellant by virtue of his office, the writs of execution in his hands, and the levy made upon the property thereon, or the appellee by his right under the chattel mortgage?

This question has been settled by this court. *Mobley v. Letts*, 61 Ind. 11; *Heimberger v. Boyd*, 18 Ind. 420; *Schrader v. Wolfen*, 21 Ind. 238; *Sidener v. Bible*, 43 Ind. 230; *Broadhead v. McKay*, 46 Ind. 595; *Landers v. George*, 49 Ind. 309; Herman Chat. Mortgages, secs. 191, 192.

The equity of redemption in the mortgaged goods still remained in the mortgagor; that was an interest which might be sold by virtue of the executions in the hands of the constable; and whatever substantial interest the mortgagee may have in the goods, he had not the right of possession as against the constable for the purpose of making the sale after the levy, nor at the time he commenced this suit; he can not, therefore, maintain an action for their possession. Sec. 436, 2 R. S. 1876, p. 207.

Howk, J., dissents.

The judgment is reversed, at the costs of the appellee, and cause remanded with instructions to sustain the motion for a new trial, and for further proceedings.

Opinion filed at November Term, 1878.

Petition for a rehearing overruled at May Term, 1879.

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66	150
147	125

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VENDOR'S LIEN.—*Real Estate Broker.*—*Lien can not be had for Broker's Commission, or for Money advanced by him.*—*Rule as to Vendor's Lien.*—*Special Finding.*—In an action by A., against C., the holder of the title to certain real estate, and D., the holder of a mortgage thereon, to enforce a vendor's lien, the court found specially, that, at a certain date, C.'s grantor, being then the owner of said real estate, agreed with A. and B. verbally, to accept a certain price for the land; that subsequently A. and B. effected a sale of the land to C. for a sum exceeding the price above named; that thereupon C.'s grantor executed to C. a conveyance for the land, receiving promissory notes for the price so fixed, executed by A., B. and C., and a mortgage executed by C., on the land, to secure payment of the notes, it being agreed that the residue of the purchase-money should be received equally by A. and B.; that B. subsequently received his share of that residue from C., who also paid off the notes held by his grantor; that A., to enable C. to pay the same to his grantor, loaned to him a certain sum of money, taking from him his promissory notes for the gross amount of such loan and A.'s share in said residue of purchase-money; that C. had paid off the note and mortgage held by his grantor; and that D.'s mortgage was subsequently executed for borrowed money.

Held, that in no event could A. have enforced a lien for the amount of his notes against C.

Held, also, that a plaintiff's right to enforce a vendor's lien must be decided upon the facts of his particular case.

SAME.—*Conclusion of Law.*—*Surplusage.*—The fact that one of several special findings of fact is merely a statement of a conclusion of law does not vitiate the other findings.

SAME.—*New Trial.*—*Venire de Novo.*—*Omission of Fact.*—*Cases Overruled.*—A material omission, in a special finding, of some fact in issue, is ground, not for a new trial, but for a *venire de novo*. *Schmitz v. Lauferty*, 29 Ind. 400, and *Cruzan v. Smith*, 41 Ind. 288, overruled on this point.

From the Shelby Circuit Court.

L. Sexton, C. Cambern, T. B. Adams and L. T. Michener, for appellant.

A. Major, S. Major and B. F. Love, for appellees.

NIBLACK, J.—This was an action by James W. Anderson, against Thomas N. Donnell, Nancy R. Donnell, his wife, and The North-Western Mutual Life Insurance Company, to recover a judgment upon a promissory note executed

by the said Thomas N. Donnell to the said Anderson for \$1,625.00, and to enforce an alleged vendor's lien upon a two-hundred-and-thirteen-acre tract of land in Shelby county.

The complaint was in three paragraphs, each alleging that the note sued on was given in part consideration of the plaintiff's equitable interest in said land, which had been conveyed by the holders of the legal title to the said Thomas N. Donnell, and afterward mortgaged by him and his wife to The North-Western Mutual Life Insurance Company, to secure a loan; each also alleging the insolvency of the said Thomas N. Donnell.

The first and third paragraphs charged that the mortgage thus executed by Donnell and wife had been paid but not entered satisfied. The second charged that the insurance company had notice of the plaintiff's lien for unpaid purchase-money, when it took the mortgage.

Donnell and wife answered :

1. In denial;
2. Payment.

The insurance company answered, specially, denying both notice of the plaintiff's lien and the alleged payment of its mortgage.

Issue being joined, the cause was submitted to the court for trial, and, at the request of the plaintiff, the court made a special finding of the facts, in substance, as follows :

1. That one Milton P. Barger was, before and on the 1st day of March, 1870, seized in fee-simple of the undivided one-half of the lands described in the complaint.

2. That, while the said Barger was so the owner of said one undivided half of said land, he verbally assured the plaintiff and one James Y. Stewart that he would accept four thousand three hundred and fifty dollars, some western lands and the release of a three-hundred-dollar debt due to said Stewart, for his said interest in

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said lands, and that thereupon the plaintiff and said Stewart effected a sale of his said interest to the defendant Thomas N. Donnell, for six thousand five hundred dollars.

3. That said Barger, in pursuance of said sale, on the 1st day of March, 1870, by deed of that date, conveyed his said interest in said lands to said Donnell for the expressed consideration of six thousand five hundred dollars, for a portion of which sum, to wit, four thousand three hundred and fifty dollars, the said Donnell, Stewart and Anderson made their two promissory notes to the said Barger, the payment of which notes was secured by a mortgage from Donnell to Barger on the interest in said lands thus conveyed. The residue of said purchase-money, to wit, two thousand one hundred and fifty dollars, was to be divided between the said Stewart and the said Anderson in equal amounts, as profits on said land trade.

4. That said Donnell, before the commencement of this suit, had fully paid said Barger said sum of four thousand three hundred and fifty dollars, in discharge of said notes, and had also paid to the said Stewart his half of said two thousand one hundred and fifty dollars, as his share in the profits of the trade.

5. That, on the 1st day of September, 1870, the plaintiff called upon Donnell for one thousand and seventy-five dollars, his share of the profits of said trade, at which time he agreed with Donnell to loan him, the said Donnell, the sum of two thousand one hundred and fifty dollars, to enable him to pay Barger what was due him on said lands, for which sum, together with said sum of one thousand and seventy-five dollars, Donnell made to the plaintiff his two promissory notes, each for one thousand six hundred and twenty-five dollars, and executed other notes for the annual interest accruing on said two notes.

6. That, before the commencement of this suit, Donnell

had paid off said interest notes, and had also paid the note for one thousand six hundred and twenty-five dollars first due, leaving the remaining one-thousand-six-hundred-and-twenty-five-dollar note, sued upon in this action, unpaid.

7. That the plaintiff did not let Donnell have the money which he agreed to loan him, said Donnell, at the time said two notes for one thousand six hundred and twenty-five dollars each were executed, but did let him have it several months thereafter.

8. That there was due upon the note in suit, including principal and interest, the sum of one thousand nine hundred and seventeen dollars and eighty cents, and for attorney's fees the further sum of one hundred and fifty dollars, making in the aggregate two thousand and sixty-seven dollars and eighty cents, collectible without relief from valuation or appraisement laws.

9. That the plaintiff has not any lien on the lands described in the complaint, for the payment of the note sued on herein.

10. That the defendant, The North-Western Life Insurance Company, had no notice of any lien, prior to the making of the mortgage to it by Donnell, upon the lands mentioned in the complaint, nor has said mortgage been paid.

The plaintiff thereupon moved the court for a new trial, assigning six causes in support of his motion.

The first five causes charged, in different forms, either that the finding was not sustained by sufficient evidence, or that it was contrary to law.

The sixth cause was as follows :

" That the court did not find specifically on all the material allegations of the complaint in issue, and supported by material and competent evidence given on the trial hereof, in this, to wit :

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"(a) The court did not find as to the solvency of defendant Thomas N. Donnell ;

"(b) That the court did not find as to the sufficiency of said Donnell's personal property for the satisfaction of his debts ;

"(c) The court did not find as to how much of the purchase-money Anderson paid Barger for the real estate mentioned in the complaint ;

"(d) That the court did not find as to whether Anderson had an interest in the land mentioned in the complaint ;

"(e) That the court did not find as to whether Anderson had sold the said land to Donnell, for which the note in suit was given ;

"(f) That the court did not find as to the amount that Donnell was to pay Anderson for his interest in the land ;

"(g) That the court did not find as to whether Anderson paid one-half [of] the purchase-money to Barger ;

"(h) That the court did not find as to whether Stewart and Anderson bought the land of Barger and sold it to Donnell ;

"(i) That the court did not find as to whether or not Anderson furnished Donnell with one-half of the money with which to pay Barger on the notes executed to him by Anderson and Stewart ;

"(j) That the court did not find the fact as to whether Donnell recognized Anderson's right to one-fourth of the land mentioned in the complaint, at the time of the conveyance thereof to him by Barger, and also subsequently, at the time of giving the notes by Donnell to Anderson, including the note sued on ;

"(k) That the court did not find as to whether or not Donnell held one-fourth of the land in trust for Anderson, from the time of making the deed until the giving of the notes."

The court overruled the motion for a new trial, and, after having stated certain conclusions of law, upon which no question is made here, rendered judgment against the defendant Thomas N. Donnell, for the amount found to be due upon the promissory note, and in favor of the defendants Nancy R. Donnell and the insurance company.

The plaintiff has appealed, and the only error he has assigned is upon the overruling of his motion for a new trial.

It is insisted on his behalf in the argument here, that the special finding was not sustained by sufficient evidence, and that, for the reasons enumerated in the sixth cause for a new trial, such finding was contrary to law. If either one of the positions thus maintained be correct, the court necessarily erred in refusing to grant a new trial.

The evidence, as presented in the record, was somewhat obscure as to some of the details of the transactions testified to by the witnesses. It was also conflicting as to some of the material matters embraced in the finding of the court.

If we were trying the cause upon the evidence, as we read it here, we might find it difficult to determine what our finding ought to be upon some portions of the evidence, but, as an appellate court, we are only required to review this evidence so far as may be necessary to ascertain whether the finding was fairly sustained by it.

We can not say that the finding in this case was not sufficiently sustained by the evidence. On the contrary, we are of the opinion that there was evidence tending, in a greater or less degree, to sustain it as to all the facts found by it. We can not, therefore, disturb the finding on account of the alleged insufficiency of the evidence.

We will next inquire whether, under the issues, any of the alleged omissions in the finding, complained of in the sixth cause for a new trial, were material omissions.

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In Sugden on Vendors it is said, at page 675, that, "If a vendor take a distinct and independent security for the purchase-money, his lien on the estate is gone; such a security is evidence that he did not trust to the estate as a pledge for his money; as where he accepted some stock for the money, with an agreement, that in case it did not within a limited time produce a sum named, the purchaser should make it up to that sum; or where a vendor accepted a mortgage of another estate for the purchase-money, the obvious intention of burdening one estate being, that the other shall remain free and unincumbered; so, even where the vendor takes a mortgage of the estate sold for only part of the purchase-money. And these appear to be well founded general rules; although LORD ELDON thought they might be liable to some exceptions." See, also, 3 Parsons Contracts, p. 278; *Bond v. Kent*, 2 Vern. 281; *Hadley v. Pickett*, 25 Ind. 450; *Mattix v. Weand*, 19 Ind. 151; *Johnson v. Sugg*, 13 Sm. & M. 346; *Bradford v. Marvin*, 2 Florida, 463; *Vail v. Foster*, 4 N. Y. 312; *Follett v. Reese*, 20 Ohio, 546.

The exceptions referred to by LORD ELDON were where the circumstances attending the transaction indicated an intention on the part of the vendor not to waive his lien by taking such distinct and independent or partial security. To the same effect, see, also, 2 Story Equity, secs. 1224, 1225 and 1226; *Gilman v. Brown*, 1 Mason, 191.

In the case before us the finding shows, that, upon certain verbal assurances from Barger, Anderson and Stewart effected a sale of the land described in the complaint, to Donnell, at a profit to themselves of \$2,150.00, to be equally divided between them; that, for the sum of \$4,350.00, which Barger was to receive in money, Anderson and Stewart signed notes with Donnell to Barger, and thus to that extent made themselves interested with Donnell in his purchase of the land; that, to further secure the payment

of said notes, Donnell mortgaged the land to Barger, thus affording an additional security which might, under some circumstances, have inured to the benefit of Anderson and Stewart; that, about six months after Barger had conveyed the land to Donnell, Anderson called upon Donnell for a settlement as to his share of the profits on the trade; that, at that time, he agreed to loan, and did afterward loan, to Donnell \$2,150.00, to pay Barger on the purchase-money for which he was jointly bound with Donnell; that, to this sum, he added the sum of \$1,075.00, his share of the profits, above named, and took from Donnell, for the gross sum, two promissory notes for \$1,625.00 each, thus commingling his profits on the land trade with the money loaned to pay Barger; that one of these last named notes has been paid, and that some interest has been paid on the other—the one now in suit.

Taking all facts thus found by the court into consideration, they appear to us to have indicated, on the part of Anderson, an intention not to rely upon a vendor's lien upon the land. They seem to us, rather, to have manifested an intention on his part to waive any claim he may have had for such a lien in favor of Barger, co-operating, as he did, with Donnell and Stewart in making Barger doubly secure as to the purchase-money due him.

Enough was shown by what the court did find, as it seems to us, to make it apparent that Anderson was not entitled to have a vendor's lien enforced against the land. We feel justified in coming to this conclusion even upon the doctrine contended for by Lord ELDON, that each case for a vendor's lien must, to a considerable extent, be governed by the special circumstances attending it, independently of the general rule laid down by Sugden on Vendors, *supra*, which appears to be well sustained by authority.

We think, therefore, that the alleged omissions in the finding of the court, conceding them all to have been real

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omissions, a question we need not now discuss, were, under the circumstances, immaterial omissions. If the court had made a finding on the matters alleged to have been omitted, favorable to Anderson, he would still not have been entitled to a judgment enforcing a vendor's lien upon the land described in his complaint.

For these reasons we see no error in the refusal of the court to set aside the finding because of such alleged omissions.

But it is contended that the ninth specification of the special finding was a conclusion of law merely, and not the finding of a fact, and that, for that reason, if for no other, the special finding ought to have been set aside.

Conceding that this specification was more a conclusion of law than the finding of a fact, as we believe it clearly was, it was surplusage merely, and could not have been properly construed to vitiate any other portion of the finding of the court, whether considered as a whole or in its separate parts.

We have discussed and passed upon the questions presented to us under the sixth cause for a new trial, upon the theory that those questions were properly raised by a motion for a new trial.

A party aggrieved is entitled to a new trial :—

1. For irregularity in the proceedings of the court, jury, or prevailing party.
2. For misconduct of the court, jury or prevailing party.
3. For accident or surprise which could not have been prudently guarded against.
4. For excessive damages.
5. For error in the assessment of the amount of recovery in certain cases.
6. When the verdict or finding is not sustained by sufficient evidence, or is contrary to law.
7. For newly-discovered evidence.

8. For error of law occurring at the trial, and properly excepted to. 2 R. S. 1876, p. 179, sec. 352.

But where the verdict or finding, whether general or special, is imperfect by reason of some defect, uncertainty or ambiguity upon its face, or by not finding upon all the issues, or by not assessing damages, or on account of some material omission, the proper motion for the party complaining is for a *venire de novo*. See *Dehority v. Nelson*, 56 Ind. 414; also *Whitworth v. Ballard*, 56 Ind. 279, and the authorities there cited.

As regards the right of a party to a new trial, or to a *venire de novo*, we see no substantial difference between the verdict of a jury and the finding of a court.

The distinction indicated as above, between a new trial and a *venire de novo*, as applicable to cases like the one at bar, may be briefly stated as follows: If any mistake is made in the facts, as found by the court, that constitutes a cause for a new trial. If any material and improper omission is made in the finding, a *venire de novo* will be awarded. *Dehority v. Nelson*, *supra*.

Observing this distinction, it is quite clear to our minds, that the objections urged to the special finding before us, under the sixth cause for a new trial, afforded proper reasons for a *venire de novo*, and not for a new trial.

We are aware that in the case of *Schmitz v. Lauferty*, 29 Ind. 400, it was held, that, where there was some material omission in a special finding, such omission made the finding "contrary to law," and that the proper method of reaching such a defect was by a motion for a new trial. We are also aware that the case of *Cruzan v. Smith*, 41 Ind. 288, recognizes a similar doctrine, and that, perhaps, one or two other cases have quoted approvingly. But that construction of the statute governing new trials does not meet the approbation of our judgments, and so much of the cases above referred to as thus construes that statute must hereafter be considered as overruled.

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The construction we give to that statute is, that a finding is "contrary to law" when, in its general scope and meaning, it is contrary to the principles of law applicable to the case, and not merely defective in some particular. *Bosseker v. Cramer*, 18 Ind. 44.

We see no sufficient reason for a reversal of the judgment.

The judgment is affirmed, at the costs of the appellant.

66	160
128	477
66	160
152	375

LONG ET AL. v. BROWN.

SPECIFIC PERFORMANCE.—*Contract to Convey Land.*—*Action against Widow and Heirs.*—*Evidence.*—*Declarations of Husband.*—*Agency.*—In an action against the widow and heirs of a decedent, to enforce specific performance of an alleged parol contract between the plaintiff and decedent, in the lifetime of the latter, for the conveyance of a tract of land sold by the decedent to the plaintiff, the latter proved an agreement between the plaintiff and the husband of one of the heirs, as to the location of a corner of such land, made during a survey thereof.

Held, that, though the husband was a nominal defendant, his agreement, without proof of his agency, binds neither his wife nor the other defendants.

SAME.—*Wife's Contract to Convey Void.*—*Ratification.*—A wife's agreement to join with her husband in conveying his land, pursuant to a contract of sale, is void, and can not be ratified by or enforced against her, on the death of her husband.

From the Delaware Circuit Court.

W. March, for appellants.

WORDEN, C. J.—This was an action by the appellee, Brown, against the appellants, who are the widow and heirs at law of Simeon Long, deceased, to enforce the specific performance of a contract for the sale of land.

It is claimed in the complaint, that Simeon Long, in his lifetime, sold to the plaintiff, Brown, a certain piece of

land, but died without having made a conveyance, and the object of the action against the widow and heirs was to procure a conveyance. It may be observed that one John Dragoo had married one of the daughters of the deceased, and he was also made a defendant to the action.

Issue was joined, and the cause tried by a jury, resulting in a verdict and judgment for the plaintiff, a new trial having been refused.

It seems that the exact identity of the land claimed to have been bought and sold could not be ascertained except by a survey, the sale having been made by a parol agreement; and the plaintiff, in the introduction of his evidence, called Jacob Bassinger and proved by him that, as he passed the land on one occasion, he was requested to stop and help survey it. The witness was asked by the plaintiff to state what, if anything, he knew about the plaintiff and Dragoo agreeing about a corner of the land in controversy. This evidence was objected to as irrelevant, and on the ground that Dragoo, as the husband of one of the heirs of the deceased, had no authority to make any agreement binding upon her, but the objection was overruled and exception taken; and thereupon the witness testified that Brown and Dragoo agreed upon a corner in the road.

The admission of this evidence, we think, was clearly erroneous. The admissions or agreements of Dragoo could in no manner bind his wife or any of the other defendants in the action. He was not shown to have been the agent of any of them. As husband he could not, by any admission or agreement that he could make, bind his wife in respect to her title or interest in land. He was but a nominal party to the action, having no interest in it. His agreement with Brown as to the corner of the land was no more binding upon the real parties in interest than would have been the agreement of any third person with Brown. See the case of *The Louisville, etc., R. W. Co. v. Richardson*, *ante*, p. 48.

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There are some other questions made upon the evidence, which we pass over, as they may not arise upon another trial of the cause, and we are not favored with any brief for the appellee.

We may remark, however, that the case does not seem to have been made out as against Minerva Long, the widow of the deceased; and the judgment would have to be reversed as against her, if there was no error in the record requiring a reversal of the entire judgment. If she, with her husband, agreed to the sale of the land, her contract, she being covert, was utterly void. Such contract is not susceptible of ratification. Nothing short of a new, valid and binding contract, made after the death of her husband, upon a new consideration, can operate as a contract to deprive her of her interest in the land.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

66	163
141	402
66	162
156	651

MILLER v. THE BOARD OF COMMISSIONERS OF DEARBORN
COUNTY ET AL.

COUNTY.—*Loan Authorized by County Commissioners.—Injunction to Prevent Payment of.—Notice that Loan is Illegal.—Ultra Vires.—Agency.*—Though the indebtedness of a certain county, evidenced by county bonds and orders, was in excess of one per centum of the assessed value of the taxable property of the county, the board of county commissioners authorized the auditor and treasurer of the county to borrow such sums of money, from time to time, as might be necessary to meet the liabilities of the county, and directing the auditor to issue county orders therefor, not exceeding however a specified sum. Similar orders were made by the board, and loans thereunder obtained, from time to time, until the aggregate indebtedness of the county exceeded two per centum of the assessed value of the taxable property of the county. A tax-payer then brought suit against the county commissioners, both as a board and personally, the auditor, treasurer and the creditor, to enjoin the payment of the additional

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indebtedness so created, the complaint alleging, in addition to the foregoing facts, that the creditor, at the time such additional indebtedness was created, had full knowledge of the prior indebtedness of the county, and of the tenor of the orders authorizing the additional indebtedness.

Held, on demurrer, that, section 17, 1 R. S. 1876, p. 166, prohibiting county commissioners from contracting additional indebtedness while a former loan thereunder exceeding one per centum of the assessed value of the taxable property of the county remains unpaid, does not prohibit temporary loans, and that the complaint is insufficient.

Held, also, that, in contracting such indebtedness, the board could act by its authorized agents.

From the Dearborn Circuit Court.

F. Adkinson, G. M. Roberts and W. S. Holman, for appellant.

J. Schwartz, J. D. Haynes and J. K. Thompson, for appellees.

PERKINS, J.—“This was an action brought by the appellant, against the board of commissioners and others, to enjoin the payment of a debt alleged to be illegally created by the county commissioners.

“The complaint alleges, in substance, that the plaintiff is a citizen and resident tax-payer of the county of Dearborn, and is the owner of real and personal estate in the county subject to taxation; that the whole amount of taxable property in the county for the year 1874 was \$10,516,920, and no more, and that, on the 5th day of August, 1874, the indebtedness of the county was \$175,000, of which sum \$100,000 was for money borrowed by the commissioners since January 1st, 1870, and that, for all the indebtedness, bonds and orders of the county had been issued by the commissioners, all bearing ten per cent. interest per annum, as the money was borrowed, and all of which were outstanding and unpaid on August 5th, 1874, and that it was all unpaid at the commencing of this action.

“That, on said 5th day of August, the commissioners illegally passed and adopted a certain void and illegal order, attempting to authorize and empower the auditor and

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treasurer of the county to borrow such sums of money as might from time to time be necessary to meet the liabilities of the county, and to agree to pay interest at ten per cent. per annum, and directing the auditor to issue orders on the county, as evidence of such loans, not to exceed however the sum of \$5,000.00.

"The complaint then proceeds to state that subsequently, from time to time, the board of commissioners made other similar orders, directing the auditor and treasurer to make other loans in behalf of the county, amounting to \$72,500.00 in the aggregate. Copies of these orders are set out in the complaint as exhibits.

"The complaint alleges that the commissioners are threatening to pay the loans—the auditor and treasurer having borrowed the whole amount; that, at the time they borrowed the said sums amounting to \$72,500.00, the whole of the indebtedness of the county above stated, amounting to \$175,000.00, was still unpaid; that the First National Bank and the People's Bank, who had loaned to the auditor and treasurer a part of said sum of \$72,500.00 they were directed to borrow by the said pretended orders, had full notice and knowledge of the amount of the indebtedness of the county, and of the tenor and effect of the orders, at the time they loaned the auditor and treasurer the money, and that, if such loans are paid, the plaintiff's taxes will be greatly increased.

"The two banks, the county commissioners as a board, and also individually, and the auditor and treasurer, were made defendants; and an order restraining the payment of the loans by the county was prayed for.

"To the complaint a demurrer was filed and sustained by the court, and this presents the question for consideration.

"The complaint is based upon the theory, that the board of commissioners of a county have no power whatever to borrow money for any purpose, except where such power

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has been *expressly* granted to such board by statute; and that such board, under no circumstances, have the power to repay a loan made without the express authority of the statute, though the money borrowed may yet be in the county treasury, or has been expended for the legitimate purposes and benefit of the county."

Thus far we have copied from the brief of appellees.

The board of commissioners of a county in Indiana is a corporation by statute. Sec. 5, 1 R. S. 1876, p. 350, declares that :

"Such commissioners shall be considered a body corporate and politic by the name and style of 'The Board of Commissioners of the County of ——,' and as such, and in such name, may prosecute and defend suits, and have all other duties, rights and powers incident to corporations, not inconsistent with the provisions of this act."

Section 13 of said statute is as follows :

"Such commissioners in their respective counties shall have power at their meetings :

"1. To make orders respecting the property of the county in conformity to law, to sell the public grounds of the county upon which the public buildings are situate, and to purchase in lieu thereof, in the name of the county, other grounds in the county-seat on which such buildings shall be erected ; to purchase other lands for the enlargement of the public square, and to take care of and preserve such property.

"2. To allow all accounts chargeable against such county, not otherwise provided for, and to direct the raising of such sums as may be necessary to defray all county expenses.

"3. To audit the accounts of all officers having the care, management, collection, or disbursement of any money belonging to the county, or appropriated for its benefit, and,

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" 4. To perform all other duties which may be enjoined on them by any law of this State."

Section 28 is this :

" When any judgment has been obtained against commissioners in their corporate capacity, the public property of the county shall be liable therefor ; but the court rendering such judgment may, before the issuing of execution, allow such board reasonable time, if the same is necessary, to assess and collect a sufficient amount of revenue to pay and discharge such judgment, in addition to the ordinary expenses of the county."

Sections 17 and 18 provide that :

" SEC. 17. Whenever it shall be necessary to construct, complete or repair the court-house, jail, or other county buildings, or whenever it may be desirable to fund or average any existing debt incurred for county purposes, and the revenues afforded by reasonable taxation are insufficient to do the same, the county commissioners may borrow, for that purpose, any sum of money not exceeding one per centum on the assessed valuation of the real and personal property of the county, and issue bonds therefor in amounts of not less than twenty-five dollars each, and bearing a rate of interest not exceeding the legal rate in the state or territory where the same are negotiated, not exceeding the rate of ten per centum per annum: *Provided*, That no second or subsequent loan shall be made or authorized by said commissioners, as above provided " (that is, a permanent loan), "so long as any former loan made under the provisions of this act shall remain unpaid.

" SEC. 18. Such bonds may be sold at any place within the United States, but at no greater discount than eight per cent., and shall be in form substantially as follows :"

The form of the bonds is here given.

It is decided in *Smith v. The City of Madison*, 7 Ind. 86, that municipal charters are to be so construed "as to carry into effect every power clearly intended to be conferred

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and every power necessary to be implied for the complete exercise of the powers granted."

And in *New England, etc., Co. v. Robinson*, 25 Ind. 536, it is decided that "corporations, along with the express and substantive powers conferred by their charters, take by implication all the reasonable modes of executing such powers which a natural person may adopt in the exercise of similar powers." See *The City of Lafayette v. Cox*, 5 Ind. 38; *Kyle v. Malin*, 8 Ind. 34; *The Board, etc., v. Day*, 19 Ind. 450; *Haag v. The Board of Comm'rs of Vanderburgh Co.*, 60 Ind. 511; *House v. The Board, etc.*, 60 Ind. 580; *The Second National Bank, etc., v. The Town of Danville*, 60 Ind. 504; *The Board, etc., v. Saunders*, 17 Ind. 437.

Section 5 of the statute above copied provides that the board of commissioners of a county shall have "all the powers incident to corporations, not inconsistent with the provisions of this act."

It is a power incident to corporations to borrow money to meet a debt, when necessary and proper. *Angell & Ames Corporations*, sec. 257; *The Board, etc., v. Day*, 19 Ind. 450. Section 17 of the statute of this State, above cited, contains a limitation upon this power. It authorizes the creation under certain circumstances, of a funded debt, in a certain amount, and prohibits the creation of a second funded debt, till the first has been paid, where it amounts to one per cent. on the taxable property. *The Board, etc., v. Cottingham*, 56 Ind. 559.

The language of the section is that no second loan shall be made, "as above provided," till the first is paid. This does not interfere with the incidental power to make temporary loans to meet temporary emergencies. *Ketchum v. The City of Buffalo*, 14 N. Y. 356, is in point.

In *Mills v. Gleason*, 11 Wis. 470, it is decided, that, "When the charter of a municipal corporation confers the power to purchase fire apparatus, cemetery grounds, to establish

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markets, and do many other things, for the execution of which money would be a necessary means; it would, in the absence of any positive restriction, confer the power to borrow money as an incident to the execution of these general powers." Accord:—*The State v. Common Council, etc.*, 7 Wis. 688; *Bank of Chillicothe v. The Town of Chillicothe*, 7 Ohio, 354; *Moss v. Harpeth Academy*, 7 Heisk. 283; *Commonwealth, ex rel., v. The Select and Common Councils of the City of Pittsburgh*, 34 Pa. State, 496; *Clarke v. School District No. 7*, 3 R. I. 199; *Hardy v. Merriweather*, 14 Ind. 203; *Sheffield School Township v. Andress*, 56 Ind. 157; *The Second National Bank, etc., v. The Town of Danville*, 60 Ind. 504.

Such is the settled law in Indiana. In Iowa a different doctrine is held. The cases are cited in *Gause v. The City of Clarksville, infra*. Statutes of different states have more or less to do with the question. Corporations may act by agents appointed by vote or resolution. *Angell & Ames Corporations, sec. 282*; *Hamilton v. The Newcastle, etc., R. R. Co.*, 9 Ind. 359.

It is unnecessary that we should consider the question, whether, had the money been borrowed without authority, the board could be enjoined from repaying it. Such an injunction in this case would scarcely be equitable. *Tash v. Adams*, 10 Cush. 252. See *Ridenour v. Wherritt*, 30 Ind. 485; *Baker v. The Board, etc.*, 53 Ind. 497; *Halstead v. The Board of Comm'rs of Lake Co.*, 56 Ind. 363; *Gause v. The City of Clarksville*, 18 Am. L. Reg., N. S. 497.

The judgment is affirmed, with costs.

SPAHR ET AL. v. SCHOFIELD ET AL.

DITCHES AND DRAINS.—*Act of 1875.—Petition.—Description of Lands.*—Section 2 of the drainage act of March 9th, 1875, 1 R. S. 1876, p. 428, does not contemplate a very accurate description, in the petition for a ditch, of the lands to be affected thereby.

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SAME.—*Description of Lands in Viewers' Report.*—The description of such lands, in the report of the viewers establishing the ditch, should be sufficiently accurate to enable the auditor to describe the lands on the tax duplicate.

SAME.—*Demurrer.*—*Motion to Dismiss.*—*Practice.*—Pleadings are not contemplated on an appeal to the circuit court from an order by a board of commissioners establishing a ditch, but a demurrer to the proceedings for insufficiency of facts is equivalent to a motion to dismiss.

From the Marion Circuit Court.

G. W. Spahr, for appellants.

I. L. Bloomer and *B. F. Davis*, for appellees.

BIDDLE, J.—Proceedings to establish a drain, under the act of March 9th, 1875, 1 R. S. 1876, p. 428.

The petition under section 2 is in the following words :

“To the Honorable Board of County Commissioners of Marion County and the Auditor of said county :

“We, the undersigned, resident freeholders of said county, would respectfully show to your honorable board, that it would be for the public health, benefit and convenience, and for the necessity of the persons whose names are hereunto attached, that your honorable board construct and build, or cause to be constructed and built, as by law in such cases made and provided, a ditch or water-course, beginning at the eastern terminus, on the line of Washington and Lawrence townships, near the south corner of the premises known as Spahr's place, in said Washington township, and running thence in a westerly direction, through the adjoining premises, known as John Negley's, and in the same direction, through the next adjoining premises, known as Smith's place, and then Huff's place, then Noble's place, then Milliard's, then Noble's place, thence through Robert Rae's premises, thence Stewart's premises, thence in a more southerly direction, through Luther Johnson's premises, thence southerly, through Thomas Hammond's premises, thence Joseph Schofield's, thence through or under Schofield's lower

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mill-race, into Fall Creek; and that we, the undersigned, whose names are hereto attached, are land-owners adjoining said proposed ditch or watercourse."

The petition was subscribed by five persons, who filed it and gave the proper bond, according to section 2.

At the next term the board appointed three freeholders, under section 2, as viewers. Subsequently, the viewers made their report, in which they seem to have described the ditch very well, by a survey and plat, except its termini. It begins at a point in the south-east quarter of section 4—16—4. What 16—4 means is not sufficiently clear to carefully preserve the rights of land-owners. We may guess that it means township 16, and range 4; but whether range 4 east or west of the meridian line, would have to be inferred, for it is nowhere shown, either in the petition or the report, in what county the land lies. The end of the ditch is described as running from a given point, "thence under said pike, through the mill-race, into Fall Creek, said mill-race belonging to House, Schofield and Ryan." It does not seem to us that a surveyor, from this description, could find where the ditch ran "under said pike," or "through the mill-race," as no direction or distance is given from the last fixed point. And the land, in the report of the viewers, is described only in that loose general way in which it is described in the petition.

Section 2 does not contemplate a very accurate description of the land, in the petition, as it is the commencement of the proceedings, and can not be certainly known without a survey; yet we fear that the description in this petition is quite too loose and uncertain to comply with its terms. We, however, express no opinion upon this point. But the description of the land in the report is inadequate. It should be sufficiently certain to comply with the terms of section 12, so that it could be placed on

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the tax duplicate, and the tax collected. *The Eel River Draining Association v. Topp*, 16 Ind. 242; *West v. The Bullskin, etc., Ditching Co.*, 19 Ind. 458; *The Jordan Ditching and Draining Association v. Wagoner*, 33 Ind. 50; *The Etchison Ditching Association v. Jarrell*, 33 Ind. 131; *Thompson v. The Honey Creek Draining Co.*, 33 Ind. 268; *Milligan v. The State, ex rel.*, 60 Ind. 206; *Scraper v. Pipes*, 59 Ind. 158.

The appellees appealed the case from the board of commissioners to the circuit court, wherein they demurred to the proceedings, for want of the sufficiency of the facts therein averred to grant the prayer of the petition. The court sustained the demurrer, and the appellant appealed to this court.

We do not think the statute contemplates pleadings to be filed in the circuit court on appeal; yet a demurrer is equivalent to a motion to dismiss the case, and may be so held. *The Foster's Branch Ditching Co. v. Makepeace*, 45 Ind. 226; *McKinsey v. Bowman*, 58 Ind. 88.

The proceedings are too defective to be maintained. The court did not err in sustaining the demurrer.

The judgment is affirmed, at the costs of the appellants. Petition for a rehearing overruled.

TIBBETTS ET UX. v. O'CONNELL.

FORCIBLE ENTRY AND DETAINER.—*New Trial.*—*Assignment of Error.*—*Supreme Court.*—*Motion to remand Cause to Justice to be Certified.*—*Title to Land.*—In an action originating before a justice of the peace, for forcible entry and detainer, the defendant, in the circuit court on appeal, moved the court, on the ground that the title to real estate had been duly put in issue before the justice by a verified answer, to remand the cause to the justice to be certified by him to the circuit court, pursuant to section

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12, 2 R. S. 1876, p. 607. This motion was overruled, and the action of the court in overruling it was made ground of a motion for a new trial.

Held, that such ruling was not ground for a new trial, but should have been assigned independently in the Supreme Court as error.

SAME.—Force.—Fraud.—Arrest.—The wife of an outgoing tenant having delivered the key to the property to one of the family of a third person for delivery to the landlord, such third person took possession of the property without leave from the landlord. The landlord, afterward finding such intruder away from the property, broke in and removed the chattels of the latter into the street. They two having agreed that the chattels should be placed on an adjoining lot, the landlord departed leaving the house in temporary possession of an agent, but both the landlord and the agent having been arrested and carried before a justice, where they were at once discharged by the officer, such intruder again took possession without leave. *Held*, that the landlord could maintain an action for forcible entry and detainer.

From the Clark Circuit Court.

J. H. Stotsenburg, J. G. Howard and J. F. Reed, for appellants.

D. C. Anthony and J. K. Marsh, for appellee.

WORDEN, C. J.—This was an action by the appellee, against the appellants, for the forcible entry and detention of certain real estate, commenced before a justice of the peace, and appealed to the circuit court.

In the latter court the case was tried by the court, who found for the plaintiff and rendered judgment accordingly.

There is but one error assigned, which is, that the court below erred in overruling the appellants' motion for a new trial.

The following were the reasons filed for a new trial:

"1. For irregularity in the proceedings of the court, by which the party was prevented from having a fair trial, in overruling the motion of the defendants to remand the cause to the justice of the peace from whom it was appealed, as shown by the bill of exceptions No. 1, heretofore filed herein;

"2. That the decision of the court herein is not sustained by sufficient evidence ;

"3. That the decision of the court herein is contrary to law."

The plaintiff in the action recovered before the justice of the peace, and the defendants appealed to the circuit court. In the latter court the defendants, before trial, moved, as is shown by the bill of exceptions referred to, to remand the cause to the justice, in order that the same might be certified to the circuit court under the provisions of sec. 12, 2 R. S. 1876, p. 607, because —

"1st. The title to real estate was properly put in issue in the cause before the justice, upon the answers and pleadings, supported by affidavit, and the justice, though required by the defendants to certify the cause, refused to do so, and compelled a trial before him ;

"2d. The justice had no jurisdiction to try the cause, for the reason that the title to land was put in issue by pleas supported by affidavit."

The court overruled this motion, and the appellants excepted.

The overruling of the motion is not made the subject of an independent assignment of error, as we think it should have been, in order to raise any question here as to the correctness of the ruling. Whether the ruling was correct or otherwise, it was not such an one as is made a ground for a new trial. Had it been, the question involved in it would have been properly raised by the motion that was made for a new trial, and the assignment of error upon the overruling of that motion.

The first clause of the statute providing for what causes new trials may be granted is the only one that has any semblance of application to such case. It specifies as causes: "Irregularity in the proceedings of the court, jury or prevailing party, or any order of court or

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abuse of discretion, by which the party was prevented from having a fair trial." 2 R. S. 1876, p. 179, sec. 352.

The manner in which the case came into the circuit court, whether by appeal or on the certificate of the justice on the ground that the title to land was put in issue, could have had nothing to do with the fairness of the trial. As fair a trial could be had in the one case as in the other.

We can not say that the finding of the court was not sustained by the evidence, or was contrary to law.

The evidence, to be sure, does not make out a very clear case of forcible entry, but it tended to establish such case, and the finding is not so clearly wrong as to call for any interference with it by this court.

The judgment below is affirmed, with costs.

NOTE.—HOWK, J., was absent when this cause was considered.

ON PETITION FOR A REHEARING.

WORDEN, C. J.—In this case the counsel for the appellants have filed an earnest petition for a rehearing, insisting that the finding was not sustained by the evidence; and, considering the confidence of the counsel in the correctness of their view of the case, we have thought proper to state the material facts involved, which we think were clearly enough shown by the evidence. The point made by counsel is, that the entry was not shown to have been made forcibly, as well as unlawfully.

We adhere to the decision in the case of *O'Connell v. Gillespie*, 17 Ind. 459, to the effect that the entry, in order to bring the case within the statute, must have been forcible as well as unlawful.

Now to the facts: O'Connell, the plaintiff, was the owner of the property in question, which was at one time in the possession of one Woolley, as his tenant. Woolley moved out and vacated the premises, apparently without

the knowledge of the plaintiff. When Woolley moved out, the key of the house was delivered by Woolley's wife to one of the Tibbetts family, who, it seemed, lived near by, for the plaintiff, O'Connell, and to be delivered to him. This does not seem to have been done, but Tibbetts and his wife, the appellants, moved into the premises, and occupied the same. The entry thus made by the appellants does not seem to have been accompanied with any thing which the law would recognize as force; and we suspect that the counsel for the appellants, in insisting that there was no force, had their minds directed more to the entry above stated than to the one hereafter to be noticed.

Afterward, on the 12th of October, 1875, the plaintiff went to the house, and found it locked up; saw the appellant Mrs. Tibbetts standing at the door of the next house and asked her where Woolley was. She said he had moved away. He asked her where the key to the house was, and she said she had it and was living in the house. On the 15th of the same month the plaintiff went back to the house, taking a man with him, and having walked around it and looked in at the windows, and seeing no appearance of any one being in it, he forced open the kitchen door and took possession of the house. He put the goods and furniture which he found there out into the street. Then James O. Tibbetts came and wanted to put the goods back, but the plaintiff would not permit him to do so. The plaintiff told him that he would put the goods any where that he would agree to, out of the street. Tibbetts then agreed that the goods should be put upon another lot. The plaintiff cleared the house of every thing, and left a man by the name of Kavanaugh in charge of it, and went down town to buy some locks. When he got down town he was arrested and taken to a justice's office. Kavanaugh was also arrested and taken to the justice's. When they arrived there, they were in-

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formed that they could go. Kavanaugh stayed in the house fifteen or twenty minutes after the plaintiff left to get the locks, when he was arrested by a constable and taken to the justice's. After the constable had arrested Kavanaugh, he, the constable, told Mrs. Tibbetts, who, it is to be inferred, came into the house while the plaintiff was putting out the goods, and remained there when he left to get the locks, to move back her goods, which she commenced doing. After the plaintiff left the justice's he went back to the house and found the appellants had moved back into it. Mrs. Tibbetts talked to him from the window. It does not appear what charge was made, or that any was made, against either the plaintiff or Kavanaugh, or upon what pretext they were arrested. No prosecution was carried on against them or either of them, but, upon arriving before the justice, they were told that they could go. The inference is irresistible that their arrest was a mere pretext to keep the plaintiff away, and take and keep Kavanaugh away, long enough to enable the appellants to move back and retake possession of the property. We can not doubt that the arrests were brought about by the procurement of the appellants, for that purpose. This is a fraud, which the law will not tolerate. 1 Cooley Torts, 190, 191.

The appellants are in no better situation than if they had personally seized the plaintiff and kept him away, and had personally seized Kavanaugh and taken and kept him away, long enough to enable them to accomplish their purpose. This they did under color of legal process. Kavanaugh was left by the plaintiff in charge of the house. The appellants, under color of legal process, and for the purpose of making a re-entry upon the premises, caused him to be arrested and taken away. Here was an application of force, as clearly as if the appellants had personally seized upon and expelled him from the house, so that they might re-enter.

Whether the plaintiff acquired possession by legal means on the 15th of October, 1875, we need not determine; but we think it reasonably clear that on that day he acquired possession, and was in possession at the time of the entry by the appellants, which we regard as forcible.

The petition for a rehearing is overruled.

66	177
127	136

MAUCK v. THE STATE.

CRIMINAL LAW.—Weight of Evidence.—Where, in a criminal prosecution, there is competent evidence tending to sustain every material fact necessary to authorize a verdict against the defendant, the Supreme Court, on appeal, will not disturb such verdict on the mere weight of the evidence.

SAME.—Obstructing Highway.—User.—Presumption.—Dedication.—Instruction.—Evidence.—On the trial of a defendant indicted for obstructing a public highway by the erection of a fence thereon, it appeared by the evidence that the highway had never been established, nor its boundaries ascertained; that it had been used for more than twenty years; that it adjoined the defendant's land; and that he was the owner of the fee of the part obstructed. The defendant also gave evidence that, twelve years prior to the finding of the indictment, in renewing a fence dividing his land from the highway, he had, as a matter of convenience and not as a dedication to the public, set the new fence in farther on his land, thus throwing the strip of land now in question out with the highway; and that the obstruction charged was a fence erected by him, re-enclosing the strip formerly thrown out. Upon these facts the defendant asked the court to instruct the jury, that, where "the State relies upon an user of less than twenty years, * " she must "give such evidence to the jury as will convince them beyond a reasonable doubt, that the defendant intended to dedicate or grant such ground to the public for the purposes of a public highway."

Held, that the instruction should have been given.

Held, also, that the presumption of dedication, arising from user of less than twenty years, may be rebutted.

From the Gibson Circuit Court.

Mauck v. The State.

C. A. Buskirk, for appellant.

T. W. Woollen, Attorney General, and *W. H. Trippet*, Prosecuting Attorney, for the State.

Howk, J.—The indictment in this case charged that the appellant, on the 1st day of June, 1879, at Gibson county, Indiana, “unlawfully obstructed a certain public highway, then and there situate, leading through the town of Princeton, in said county, and from said town of Princeton to the town of Patoka, in said county, by then and there unlawfully erecting a fence in, upon, along and across said highway, contrary to the form of the statute,” etc.

The cause was tried by a jury, and a verdict was returned finding the appellant guilty as charged in the indictment, and assessing his punishment at a fine in the sum of fifty dollars. The appellant’s motion for a new trial having been overruled by the court, and his exception entered to this decision, judgment was rendered on the verdict, from which judgment this appeal is now here prosecuted.

The only error assigned by the appellant, in this court, is the decision of the court below in overruling his motion for a new trial. Many causes for such new trial were assigned by the appellant, in his motion therefor; but of these causes we will consider such only as his counsel has presented and discussed, in his brief of this case, in this court.

It will be seen from the indictment, that the appellant was therein charged with the commission of the offence which is defined, and its punishment prescribed, in section 66 of “An act defining misdemeanors and prescribing punishment therefor,” approved June 14th, 1852. This section provides, that “Every person who shall in any manner obstruct any public highway, * * * * * shall be fined not exceeding five hundred dollars, or imprisoned not exceeding three months; and upon prosecution for obstructing a highway, it shall be sufficient to prove that it is used and worked as such.” 2 R. S. 1876, p. 479.

The appellant's counsel very earnestly insists, in argument, that the verdict of the jury was not sustained by sufficient evidence. He does not claim, as we understand his argument, that there is no evidence, in the record, which tends to sustain the verdict; but he contends, that "an overwhelming preponderance" of the evidence is against the verdict. We have carefully read all the evidence in the record, and we have failed to find that preponderance in the evidence, insisted upon so earnestly by the appellant's counsel. It has seemed to us, from our reading of the evidence, that the charge in the indictment is fairly sustained by sufficient evidence; and, at least, that there is an abundance of evidence in the record, which tended strongly to sustain the verdict of the jury. In such a case, it is settled by the decisions of this court, that it can not and will not attempt to weigh the evidence, nor to determine its preponderance either for or against the verdict. It is true, that the evidence in this case was very conflicting, and that the witnesses on the one side or the other must have been at least mistaken in their recollection of the facts in connection with the highway in controversy, and its user by the public; but the jury trying the cause had opportunities and facilities for determining the credibility of the witnesses, and the proper weight and probable truth of their testimony, which we, as an appellate court, can not possibly have. Besides this, the verdict in the case at bar has received the sanction and approval of the able, learned and intelligent court in which the cause was tried. We cannot, therefore, disturb the verdict on the evidence.

The appellant complains of the refusal of the court to give the jury trying the cause instruction 2, asked by him. This instruction reads as follows:

"2. If the jury do not find that the ground charged to have been obstructed as a highway by the defendant was regularly established as such highway by an order of the

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Board of County Commissioners of Gibson county, and do not find it was established as a highway by an user of twenty years or more previous to the finding of the indictment in this cause, by evidence which leaves no reasonable doubt upon such question, then, in order to make out the case against the defendant, it devolves upon the State, if the State relies upon an user of less than twenty years of such ground on the part of the public as a highway, to give such evidence to the jury as will convince them beyond a reasonable doubt, that the defendant intended to dedicate or grant such ground to the public for the purposes of a public highway."

If this instruction contains a true statement of the law of this State, on the point indicated therein, and if, in that event, the substance of the instruction was not embraced in nor covered by the instructions given by the court of its own motion, then it is very clear, we think, that the court erred in its refusal to give this instruction, at the appellant's request. In other words, it can not be questioned, as it seems to us, that this instruction was pertinent to the case which the appellant's evidence tended strongly to establish, that he never intended to dedicate or grant the ground in controversy to the public, for the purposes of a public highway. Therefore, if this instruction stated the law of this State, the appellant had the right to ask, and to insist, that it should be given to the jury in some form, either as it was written or in the court's own language. The appellant was the absolute owner in fee of the ground in controversy. This fact was not disputed nor questioned by the State; but it was claimed that the public had in some manner acquired an easement in and over such ground, for the purposes of a public highway. There was no evidence offered of any order of the Board of Commissioners of Gibson county, establishing the highway described in the indictment. The highway

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had been in use for more than twenty years prior to the finding of the indictment in this case; but the evidence failed to show that its lines had ever been ascertained, located or established with any degree of certainty. For a number of years prior to 1866, the appellant's lands were separated from the highway by a rail fence. This fact is not disputed, but the evidence as to the precise location of this rail fence is sharply conflicting. In 1866 the appellant built a plank fence in lieu of the old rail fence. He and his witnesses, who built this plank fence, testified positively that it was set back six feet from and inside of the rail fence, and six feet further from the highway. The appellant testified, that he thus set back the plank fence from the old rail fence for his own convenience, on account of the ground being washed in places and that he never gave, nor intended to give, the strip of ground between the plank and rail fences to the public or any one else, but had always regarded it as his own land. In 1877, he built a new plank fence, and had set it out again five feet from the old plank fence, toward the highway. This new plank fence is the fence mentioned in the indictment in this case, as having been erected by the appellant "in, upon, along and across said highway."

The appellant's evidence and that of his witnesses, in regard to the location of these several fences, were contradicted by much of the evidence on the part of the State. But the appellant's evidence, if true, showed very clearly that the appellant had never dedicated nor granted, nor had he intended to dedicate or grant, the strip of ground in controversy to the public for the purpose of a public highway, and that the user by the public of said strip of ground, as a highway, had not continued for a longer period of time than about twelve years. Manifestly therefore, if the appellant's instruction 2 stated the law correctly, it was pertinent to the case which his evidence tend-

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ed to establish. It is very clear to our minds, that the instruction does contain a fair statement of the law of this State, applicable to the subject of the instruction, in such a case as the case at bar. *Mansur v. The State*, 60 Ind. 357, and *Mansur v. Haughey*, 60 Ind. 364, and the authorities cited. The record fails to show, that the court gave the jury, in its own charges, the substance of this instruction 2; and therefore we are bound to hold that the court erred in its refusal to give the jury said instruction 2, at the request of the appellant.

It is earnestly insisted by the counsel for the State, that the doctrine laid down in the case of *Mansur v. The State*, *supra*, to the effect that there must be "an intent to dedicate on the part of the owner," and "also an acceptance by or on behalf of the public," to constitute a dedication, cannot be reconciled with some of the previous decisions of this court. In this connection, we are referred by counsel to the following cases, which are supposed to be in conflict with the case last cited, to wit: *Phipps v. The State*, 7 Blackf. 512; *Hays v. The State*, 8 Ind. 425; and *The State v. Hill*, 10 Ind. 219. The doctrine of these cases, on the point now under consideration, is thus stated in the last one cited.

"The unopposed user of a highway by the public, over the land of an individual who is cognizant of the fact, for a much less period than twenty years—say four or five years—was sufficient to raise the presumption of a dedication. Indeed, the weight of authority seems to be, that the use of land for a highway for such a length of time that public accommodation and private rights might be materially affected by an interruption of the enjoyment, would be evidence that the owner intended a dedication to the public. *Jarvis v. Dean*, 3 Bingh. 447. 2 Greenl. Ev., sec. 662."

There is certainly no conflict between these cases and the case of *Mansur v. The State*, *supra*. In the latter

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case, it is held that an intention on the part of the owner to dedicate is necessary to constitute a dedication; and, in the former cases, it was held that certain facts would constitute evidence of such an intention of the owner to dedicate, and would be sufficient to raise a presumption of a dedication.

The State's attorneys have also referred us to the cases of *Holcraft v. King*, 25 Ind. 352, and *Fisher v. Hobbs*, 42 Ind. 276. In these cases, on the point now under consideration, it was decided that "Public highways may be established in this State, * * * * * thirdly, by dedication, arising by presumption from a continued use of the place for a considerable period of time by the public as a public highway, with a knowledge thereof by the owner, and without objection on his part." We see nothing in the cases last cited, which can not be readily reconciled with the doctrine of *Mansur v. The State*, *supra*. This doctrine of dedication, arising by presumption, was also recognized by this court, in the case of *Mansur v. Haughey*, *supra*, in which it was held, on the authority of the case of *McCormick v. The Mayor, etc., of Baltimore*, 45 Md. 512, that "as dedication will be presumed, where the facts and circumstances of the case clearly warrant it, so that presumption may be rebutted, and altogether prevented from arising, by circumstances incompatible with the supposition that any dedication was intended."

It certainly will not do to hold, that the evidence of an intended dedication, or the presumption of a dedication, was itself an absolute dedication; and yet it seems to us, not only that this is the position of the State's attorneys, in their argument of this case in this court, but that the court below, in its instructions, must have been governed and controlled by the same erroneous view of the law, that the evidence of the fact is the fact itself. Such a view of the law will not do in the administration of criminal law,

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where the evidence of every material fact must establish the fact beyond a reasonable doubt. Thus, in its third charge, the court below instructed the jury as follows:

"3. The rule upon the subject of the location of highways by a dedication, as I understand the law, is this: The unopposed use by the public of a road over the land of an individual who is cognizant of the fact, for a period of twenty years, would give the public an absolute right against such individual to have such road kept open for the use of the public. And when the use is shown to have been continued until public accommodation and private rights would be materially affected by the interruption of the same, although not for a period of twenty years, and if the proper authorities had accepted the same, as a public highway, in such case, the owner of the land over which such road would pass would not have the right to shut up such road."

We are clearly of the opinion, that the last sentence of this third charge does not contain a true statement of the law of this State; for it makes the facts recited therein, which at most would be merely "evidence that the owner intended a dedication to the public," (*The State v. Hill, supra*,) so absolutely conclusive of the owner's rights in the premises, as to amount to an absolute estoppel. Surely, this is not the law in any case, and least of all in a criminal cause, where the defendant is or ought to be entitled to the benefit of every reasonable doubt, as to every material fact necessary to his conviction. Such evidence or presumption of a dedication is not conclusive of the question; but the defendant, in such a case as the one at bar, certainly has the right, and ought to be permitted, to show by evidence, if he can, that in point of fact he never intended a dedication. The presumption of a dedication, arising from the facts stated in the third charge, as it seems to us, may be contradicted, rebutted and overcome

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by evidence and facts which show or tend to show that the owner of the land, over which the supposed public highway may pass, never intended a dedication of such land to the public, for the purposes of such highway.

Then, in such case, where the State relies upon a user of the land for less than twenty years, as evidence that the owner intended a dedication of the land to the public for a public highway, or as authorizing a presumption of such a dedication, we think that the court should fairly instruct the jury trying the cause, to the effect that, unless they were satisfied upon all the evidence in the cause, beyond a reasonable doubt, that the defendant intended to dedicate or grant such land to the public, for the purposes of a public highway, they must find for the defendant.

For the reasons given, we hold that the court erred in overruling the appellant's motion for a new trial.

The judgment is reversed, and the cause is remanded for a new trial.

PATTERSON v. THE STATE.

CRIMINAL LAW.—Murder.—Evidence of Conduct of Deceased previous to Murder.—Intoxication.—On the separate trial of a defendant indicted jointly with others for murder, it appeared by the evidence, that, on the day of the killing, the defendant and the deceased had an altercation; that the defendant and others, subsequently meeting the deceased, set upon him to beat him and to take from him a pistol which he refused to give up; that the deceased vainly endeavored to get away; and that the pistol, being wrenched from him, was discharged, whether accidentally or purposely being uncertain, but killing the deceased. There being other wounds upon the deceased not contributing to his death, the defendant, to show that the deceased had received these wounds prior to such assault, offered to prove that the deceased had been intoxicated, boisterous, violent and quarrelsome, during the day on which he was killed.

Held, that the evidence was too remote, and was incompetent.

66	185
164	270

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SAME.—Instruction.—Manslaughter.—Malice.—Purpose.—It was proper to instruct the jury in such case, that, if the killing was done unintentionally during an affray, or intentionally in hot blood engendered by the combat, but without malice, the crime was no more than manslaughter. But it was erroneous to add, that "if the person who does the killing entertained malice towards his victim, and out of such malice slew him, his crime would be murder, notwithstanding his blood was heated by the combat."

SAME.—Killing in Hot Blood.—It was also erroneous to instruct the jury that if, in an unprovoked assault by the defendant upon the deceased, the latter was "intentionally and unlawfully" slain by the former, the slayer "is guilty of murder, notwithstanding his blood may have become so heated as to carry him beyond his original purpose."

From the Owen Circuit Court.

W. R. Harrison and *W. E. McCord*, for appellant.

T. W. Woollen, Attorney General, *S. O. Pickens*, Prosecuting Attorney, and *I. H. Fowler*, for the State.

BIDDLE, J.—The appellant was indicted, being impleaded with Charles Patterson, William Adams and John Bryant, for the murder in the first degree of Anthony White.

Adams was tried separately and found guilty of manslaughter. *Adams v. The State*, 65 Ind. 565.

The appellant also pleaded separately, was tried and convicted of murder in the second degree. He appeals to this court, and presents two questions for our consideration.

The evidence in the case tends to prove that the appellant and the deceased, previously to, but upon the same day of, the fatal conflict, had a difficulty, which led to a quarrel, about some drinks which the deceased had ordered for them, and did not pay for. Afterwards the parties came together, and the appellant and others set upon the deceased to beat and take from him a pistol which he had refused to give up. The deceased endeavored to escape from the fight, but could not get away. During the conflict the pistol was taken from the deceased and fired off, but whether by accident or with the purpose of killing the deceased does not clearly appear. The bul-

let entered the back part of the head of the deceased, ranged forward and downward, and lodged at the base of the brain. He died almost instantly of the wound. There were other slight wounds on the scalp of the deceased, and a bruise upon one of his shoulders, but they were unimportant in causing his death.

The above evidence is sufficient to show the applicability of the questions presented by the record.

At the trial, evidence was offered on behalf of the appellant to prove that the deceased, upon the day he was killed, became very much intoxicated, was riding around the country on horseback in that condition, endeavoring to pick a quarrel with whomsoever he met; that while on foot he was taken by the arms by two persons and conducted along the road a distance of fifty yards, and induced to mount his horse; that he rode several miles to a public meeting and picnic, where he dismounted and mingled with the crowd, around a band of music, and was there performing, leaping and attempting to dance; that in the afternoon he was still greatly intoxicated. Which evidence was offered to the jury, to affect the question as to the manner in which said deceased received the wounds other than that supposed to be the pistol shot.

This evidence was rejected by the court; but the court offered to admit it, if the defendant would declare that he sought or expected to prove thereby, or claimed, that any of the injuries on the person of the deceased were occasioned thereby, or received therein, or might have been inflicted thereby, which offer the defendant refused, and excepted to the ruling of the court.

This evidence, so offered, was too remote to authorize any fair inference by the jury that the wounds mentioned were received as accidents of the drunken behavior of the deceased; and, as the appellant had no more evidence to offer tending to show that the wounds were received in that manner, it was properly rejected. While we are clearly

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of the opinion that the evidence was incompetent for the purpose offered, yet we express no opinion as to whether such evidence was competent for any other purpose or not, as no such question is presented by the record.

After the close of the evidence in the case, the court gave the following instruction to the jury :

" 18. When two persons enter upon a combat by mutual agreement, neither intending to kill the other, and one of them unintentionally slays the other by the force he uses therein, or, out of the hot blood engendered by such combat, and without malice, intentionally slays the other by the force he uses therein, the grade of such homicide is but that of manslaughter. But if the person who does the killing entertained malice towards his victim, and out of such malice slew him, his crime would be murder, notwithstanding his blood was heated by combat.

" Where one or more persons, not being moved by legal provocation so to do, assail another for the purpose of giving him a beating and wounding, and the person thus assaulted does nothing except ward off the attack made, and refuses to enter into combat with his assailants, and in such attack is intentionally and unlawfully slain by his assailants, the one who thus slays him is guilty of murder, notwithstanding his blood may have become so heated as to carry him beyond his original purpose.

" And so, in this case, if you find that James Patterson and others made an unlawful assault upon Anthony White, the deceased, not in hot blood arising out of sufficient provocation, with the intention of beating and wounding said White but not of killing him, and find that said White refused to enter into combat with them, and did nothing but ward off their assault, and find that during said attack the defendant James Patterson's blood became heated, and that, impelled by such hot blood, he drew a weapon, or seized one, and intentionally shot and killed said White,

said defendant would be guilty of murder in the second degree."

This instruction, although given as one, contains three distinct propositions, which we have divided into paragraphs for convenience in its examination. The question presented for our consideration is, whether the facts supposed as the basis of the instruction constitute murder, either in the first or second degree.

Murder in the first degree is defined by our statute as follows :

"**SEC. 2.** If any person of sound mind shall purposely and with premeditated malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison, or causing the same to be done, kill any human being, such person shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death." 2 R. S. 1876, p. 428.

Murder in the second degree is defined as follows :

"**SEC. 7.** If any person shall purposely and maliciously, but without premeditation, kill any human being, every such person shall be deemed guilty of murder in the second degree, and on conviction thereof, shall be imprisoned in the state-prison during life." 2 R. S. 1876, p. 426.

It is plain, from the above definitions, that murder in the first degree can not be committed in a case like the present, arising out of combat, unless the killing was done "purposely and with premeditated malice;" and that murder in the second degree can not be committed in any case unless the killing was done "purposely and maliciously."

The first proposition of the charge instructs the jury, that if the killing was intentionally done, in hot blood engendered by a combat, without malice, it is no more than manslaughter. This is correct. But, in the succeeding sentence, the jury are instructed, that, "if the person

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who does the killing entertained malice towards his victim, and out of such malice slew him, his crime would be murder, notwithstanding his blood was heated by combat." This sentence, as it leaves out the element of premeditation, could have been but murder in the second degree at most; and, if so, the jury should have been instructed accordingly, and not as to murder generally, which they might understand to mean murder in the first degree.

The second paragraph of the instruction tells the jury, that, if the slaying in combat was "intentionally and unlawfully" done, the slayer "is guilty of murder, notwithstanding his blood may have become so heated as to carry him beyond his original purpose." This instruction, as it leaves out the elements of premeditation and malice in the offence, can not amount to murder either in the first or second degree. The facts supposed amount to no more than manslaughter.

In the third paragraph of the instruction, essentially the same facts are supposed as those stated in the second, by way of hypothesis; indeed, the instruction is essentially the same as the second, except that the names are mentioned, the killing supposed to be done by a weapon, and the murder restricted to the second degree.

For these reasons we think the instruction throughout is erroneous. No killing in a combat which engenders hot blood, however unlawful, can be murder even in the second degree, unless the elements of purpose and malice concur in the act. Such a killing may amount to manslaughter, but it can not be murder in either degree. 1 Bishop Crim. Law, secs. 427, 428, 429; 1 Archb. Crim. Pr. & Pl. 740; *Ex Parte Moore*, 30 Ind. 197; *Murphy v. The State*, 31 Ind. 511; *Miller v. The State*, 37 Ind. 432; *Allison v. The State*, 42 Ind. 354; *Field v. The State*, 50 Ind. 15; *Wall v. The State*, 51 Ind. 453; *Bechtelheimer v. The State*, 54 Ind. 128.

Garver v. Pontious et al.

The judgment is reversed, and the cause remanded, for further proceedings. The clerk will make the proper order for the return of the prisoner.

GARVER v. PONTIOUS ET AL.

ATTORNEY'S FEE.—*Promissory Note.*—An unconditional stipulation in a promissory note, for the payment of an attorney's fee, is valid.

From the Hamilton Circuit Court.

W. Garver, for appellant.

A. F. Shirts, G. Shirts and W. R. Fertig, for appellees.

Howk, J.—This was a suit by the appellees, as payees, against the appellant, as the maker, of a promissory note, of which the following is a copy :

“\$60.19. NOBLESVILLE, IND., Jan. 29th, 1877.

“One day after date, we jointly and severally promise to pay to the order of Pontious & Wainwright, at Citizens Bank, Noblesville, Ind., sixty 19-100 dollars, with ten per cent. interest from date, if not paid when due, and reasonable attorney's fees; value received, without any relief whatever from valuation or appraisement laws. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note.

(Signed,)

“W. GARVER.”

The cause was put at issue and tried by the court, resulting in a finding for the appellees, for the amount of the principal and interest due on the note, and for an attorney's fee of ten dollars. The appellant's motion for a new trial having been overruled, and his exception saved to this ruling, judgment was rendered by the court on its finding.

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The appellant has properly assigned, as error, the decision of the circuit court in overruling his motion for a new trial. The only point made by the appellant's counsel, in his argument of this cause, is, that the court erred in finding for the appellees the amount of the attorney's fee, and that, to that extent, the damages assessed by the court were excessive. By an act approved March 10th, 1875, it was provided "That any and all agreements to pay attorney fees, depending upon any condition therein set forth, and made part of any bill of exchange, acceptance, draft, promissory note or other written evidence of indebtedness, are hereby declared illegal and void." Acts 1875, p. 4; 1 R. S. 1876, p. 149. In the case of *Churchman v. Martin*, 54 Ind. 380, this act was considered and construed by this court, and it was there held that "Two things are clearly and unequivocally required to bring a case within the statute.

"*First.* The agreement to pay attorney fees must depend upon a condition.

"*Second.* The condition must be set forth in the instrument."

The doctrine of the case cited was approved and followed by this court, in the more recent cases of *Brown v. Barber*, 59 Ind. 533, and of *Smock v. Ripley*, 62 Ind. 81.

In all these cases, in construing the statutory provision above quoted, it was held that an unconditional stipulation in a promissory note, for the payment of attorney's fees, is valid and binding, and may be enforced. The cases cited are decisive of the case at bar; for the note in suit in this case, as will be seen from the copy thereof above set out, contained an absolute and unconditional stipulation for the payment of reasonable attorney's fees. The motion for a new trial was properly overruled.

The judgment is affirmed, at the appellant's costs.

McLaughlin v. The State.

McLAUGHLIN v. THE STATE.

CRIMINAL LAW.—*Liquor Law.—Appeal to Supreme Court, When to be Taken.*

—An appeal by the defendant, to the Supreme Court, from the judgment rendered in a prosecution for a violation of the liquor law, must be taken within a year from the rendition of judgment.

SAME.—*How Appeal is Taken.—Notice.—Record.*—Such appeal can not be authorized by the court in term time, but must be taken by service of the proper notice upon the clerk of the circuit court and the prosecuting attorney, and the transcript must be filed in the office of the clerk of the Supreme Court within thirty days after service of such notice.

From the Henry Circuit Court.

C. G. Offutt and W. H. Martin, for appellant.

T. W. Woollen, Attorney General, and J. M. Brown, Prosecuting Attorney, for the State.

NIBLACK, J.—This was a prosecution against Raleigh McLaughlin, the appellant, for retailing intoxicating liquor without a license, and was commenced before a justice of the peace.

The appellant was convicted before the justice, and, upon an appeal to the circuit court, he was again tried and convicted, the judgment having been rendered against him in this latter court on the 2d day of May, 1878.

During the term at which such judgment was rendered, the appellant prayed an appeal to this court, and executed an appeal bond to the approval of the court.

The transcript of the proceedings below was not, however, filed in this court until the 7th day of July, 1879, more than fourteen months after the time of the rendition of the judgment, and then without proof of notice of an appeal, either to the clerk of the court below or to the prosecuting attorney.

A motion has been entered on behalf of the State, to dismiss the appeal for want of a compliance with the statute authorizing appeals in criminal cases.

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That statute provides, that "The appeal must be taken within one year after the judgment is rendered, and the transcript must be filed within thirty days after the appeal is taken." An appeal is taken by the service of a notice upon the clerk of the court where the judgment was rendered, stating that the appellant appeals from the judgment. If taken by the defendant, a similar notice must be served upon the prosecuting attorney." 2 R. S. 1876, p. 411, secs. 151, 152.

There being no proof of notice to the clerk and the prosecuting attorney, as above required, we have nothing before us to show that an appeal has been taken in the cause.

It is the notice which constitutes the appeal. *Winsett v. The State*, 54 Ind. 437; *Buskirk Practice*, 417.

An appeal in a criminal cause, during term time, by order of the court trying the cause, is not authorized by the statute and does not dispense with the notice provided for in section 152, *supra*.

If we had proof that proper notice of an appeal had been given within the year during which an appeal was allowed, still this appeal could not be sustained because the transcript was not filed in time. Not having been filed for more than thirty days after the last day on which such a notice could have been lawfully given, the motion to dismiss the appeal will have to be sustained.

The appeal is dismissed, at the costs of the appellant.

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REPLEVIN. *Husband Liable for Wife's Tort.*—The husband is liable, in an action of replevin, for the unlawful detention by his wife, under claim of title in herself, of the chattels of another.

66	194
170	76
66	194
171	699

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SAME.—*Act of 1879 Concerning Married Women.*—*Supreme Court.*—The act of March 25th, 1879, Acts 1879, p. 160, "concerning married woman," is not considered by the Supreme Court, in determining the liability of a husband for the tort of the wife, in an action tried prior to that time.

SAME.—*Disclaimer no Ground for Dismissal.*—*Title in Third Person.*—Title in a third person is a good defence in replevin, but the defendant is not entitled, on his verified disclaimer of interest in the property, and allegation of title and possession in a third person, to a dismissal of the suit.

SUPREME COURT.—*Record.*—*Instruction.*—*Signature of Judge.*—*Exception.*—*Bill of Exceptions.*—On appeal to the Supreme Court, the record set out, without a bill of exceptions, the instructions of the court to the jury, and also the file-mark and signature of the clerk of the court below, showing the fact and the date of their filing, accompanied, also, by his statement that the same had been given on motion of the defendant. On the margin of the record, opposite one of such instructions, was the word "Given," preceding what purported to be the signature of the judge, and also the words "Excepted to at the time by Pl'ff," preceding what purported to be the signature of the plaintiff's attorney; but the instruction nowhere appeared to have been signed by the defendant or his attorney.

Held, that the instruction is properly in the record, and that the defendant can not object that he had not signed the same.

From the Cass Circuit Court.

D. P. Baldwin, for appellant.

H. C. Thornton, for appellee.

WORDEN, C. J.—Replevin by Choen, against Porter, for some hogs.

The action was commenced before a justice of the peace, and appealed to the circuit court, where it was tried, resulting in a verdict and judgment for the defendant, a new trial being refused.

On the trial, the court gave to the jury the following, among other, charges, viz.:

"No. 6. In this case, if you find from the evidence, that, at the commencement of this action, the property described in the complaint was in [on?] the farm of the defendant, but was claimed by his wife and son, and that they had the control and care of said property, and the defendant took no steps in detaining said property, but

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merely allowed the same to be kept on his farm by his wife and son, that would not be such a detention of said property, as the law contemplates, to entitle the plaintiff to recover against the defendant in this action."

This charge was duly excepted to by the appellant, and the giving of it was assigned as one of the reasons for a new trial.

We think the charge means, and must have been so understood by the jury, that the defendant was not liable for the detention of the property, and an action would not lie against him therefor, if the detention was caused by his wife and son, and he did nothing more in the way of such detention than to allow his wife and son to keep it on his farm.

This we regard as an incorrect statement of the law. The unlawful detention of the plaintiff's property was a tort; and if it was thus detained by the defendant's wife, he became liable to the plaintiff for the act. The husband is liable for the torts and frauds of his wife committed during coverture. *Ball v. Bennett*, 21 Ind. 427; *Cooley Torts*, 115. The husband is clearly liable in such case; and, if it be objected that the wife ought to have been joined in the action with her husband, it may be answered that no question was made in the case as to her non-joinder.

The modern statutes, enlarging the rights of married women in respect to property, do not release the husband from his common-law liability for the personal torts committed by his wife; but he may not be liable for torts committed by her in the management and control of her separate property. See *Rowe v. Smith*, 45 N. Y. 230; *Baum v. Mullen*, 47 N. Y. 577; *Kowing v. Manly*, 49 N. Y. 192; *Fiske v. Bailey*, 51 N. Y. 150.

But it can not be said that where she merely claims the property of another, and detains the same, the husband is not liable for the detention.

For the error in giving the charge above set out, the judgment will have to be reversed, and we pass over some other questions made by the appellant, as they may not arise upon another trial of the cause.

The appellee has assigned a cross error, upon the following ruling of the court below :

While the cause was pending and before trial, the defendant moved the court to dismiss the action as to him, and to substitute as defendants William R. and Mary Ann Porter, because the defendant filed before the justice who tried the cause his affidavit, stating, in substance, that he never had any interest in or claim to the property in dispute, that one of the two hogs in dispute belonged to Mary Ann Porter, and the other to William R. Porter, who owned the property long before the commencement of the action ; that the defendant never detained the property, which was in the possession of the persons named at the time the action was commenced ; that the persons named demand of him the property, which he cannot deliver to them by reason of this suit. The affidavit denies all collusion.

The court overruled this motion, and we think very correctly. If the title to the property was in the persons named, that was a good defence to the action, because the plaintiff could not recover without showing title in himself.

The affidavit of the defendant, that the title to the property was in others, and therefore not in the plaintiff, could not be received to settle the question of title against the plaintiff in that summary way, and thereby discharge the defendant from the action. Nor can a defendant in replevin be discharged from the action by disclaiming title to the property, because he is liable for damages and costs if he wrongfully and unlawfully detained it, and for the value of the property unless it is restored to the plaintiff.

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The judgment below is reversed, with costs, and the cause remanded for a new trial.

NOTE.—BIDDLE, J., was absent when this cause was considered.

ON PETITION FOR A REHEARING.

WORDEN, C. J.—The appellee has filed a petition for a rehearing in this case, in which it is claimed, as we understand it, that, under our statutes in respect to the rights of married women, the husband is not liable for the torts of his wife, committed without his participation therein. And he has called our attention to the following paragraph in Cooley on Torts, 118, in support of the position: "In Illinois it has been decided that under the new statutes the husband is not liable for a slander of the wife in which he did not participate, though the statutes on the subject, which were supposed to have changed the common law, were silent as regards her torts, and only purported to secure to the woman her property and earnings and the full control and enjoyment thereof. This is, perhaps, a sound conclusion. Certainly the reasons on which the new legislation proceeds are such as should leave the wife to respond alone for her torts, for they assume that she is fully capable of controlling her own actions, and can and will act independently of her husband."

The decision referred to by the learned author, in the above extract, was made in the case of *Martin v. Robson*, 65 Ill. 129. The Illinois statutes in respect to the rights of married women, however, differ somewhat from our own. The statutes of the two states are much alike in respect to the property of married women; but in Illinois a married woman is "entitled to receive, use and possess her own earnings, and sue for the same in her own name, free from the interference of her husband." This feature of the Illinois statutes seems to have been an important ele-

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ment leading to the conclusion arrived at, that the husband was not liable for the torts of the wife. The court said, among other things: "The right, therefore, to receive and use her own earnings, uncontrolled by the husband, is conferred in express terms. The practical enjoyment of this right presupposes the right to appropriate her own time. The right to take and possess the wages of labor must be accompanied with the right to labor. If the husband can control, then the statute has conferred a barren right. If the wife can still only acquire earnings with his consent, then the statute was wholly unnecessary, for she might have done this prior to its enactment. The clear intent of the statute is, not alone to give to the wife the right to accept and use her earnings, but the right to labor, and thus acquire them.

"The intention of the Legislature to abrogate the common-law rule, to a great degree, that husband and wife were one person, and to give to the latter the right to control her own time, to manage her separate property, and contract with reference to it, is plainly indicated by these statutes. While they do not expressly repeal the common-law rule, that the husband is liable for the torts of the wife, they have made such a modification of his rights and her disabilities, as wholly to remove the reason for the liability."

In this State the common law prevails as to the earnings of the wife during coverture, and they belong to the husband. *Yopst v. Yopst*, 51 Ind. 61.

In the case of *Ball v. Bennett*, 21 Ind. 427, cited in the original opinion in this cause, which was decided without any very elaborate consideration it is true, after the passage of the most of our statutes enlarging the rights of married women, it was held that the husband was liable for the torts and frauds of the wife committed during coverture. We find nothing in our statutes which, in our

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opinion, evinces an intention on the part of the Legislature to change the common law on that subject.

On the contrary, one of our statutory provisions clearly recognizes the common-law liability of the husband for the wife's torts. It is provided, that, "When any judgment is rendered against a husband and wife, for the tort of the wife, execution on such judgment shall be first levied on the land of such wife, if she have any." 1 R. S. 1876, p. 550, sec. 4.

The effect of an act passed after the trial of this cause, Acts 1879, p. 160, in reference to the earnings of married women, is not considered in passing upon this petition.

It was suggested in the original brief of the appellee, and it is now insisted, that the instruction is not properly in the record. In the original opinion we said nothing upon this point, because we thought it too clear for controversy. The instruction is not contained in any bill of exceptions.

The record contains the following entry in the cause :

"Come again the parties, and come also the jury, and after hearing the arguments of counsel and the instructions of the court, the jury retire for deliberation under the charge of a sworn bailiff. The following are the instructions of the court above referred to, and are marked 'Filed Oct. 22, 1875, Noah S. La Rose, Cl'k,' in these words:—"

Then follow several instructions, including that set out in the original opinion, given on motion of the defendant. On the margin of the record, as it comes to us, opposite the instruction, appears the following :

"Given. D. H. Chase, Judge. Excepted to at the time by Pl'ff. Baldwin & Justice, for Pl'ff."

We think this was a substantial compliance with the statute, which provides that "A party excepting to the

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giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions; but it shall be sufficient to write at the close of each instruction, 'refused and excepted to,' or 'given and excepted to,' which shall be signed by the party or his attorney." 2 R. S. 1876, p. 168, sec. 325. See Buskirk Prac. 101-2.

The plaintiff's exception to the instruction was probably noted on the margin of the paper on which the instruction was written. This we think may be regarded as "at the close of the instruction," within the spirit and purpose of the statute. Indeed, instructions are frequently, if not generally, written so closely together that no room is left for the opposite party to write his exceptions literally "at the close of each instruction."

Writing and signing the exception upon the margin of the paper opposite each instruction very clearly indicate the instruction to which the exception applies, and are a sufficient compliance with the statute.

But it is urged by the appellee, that, as the instruction was not signed by the appellee, who was the defendant below, or his attorney, the instruction can not be made a part of the record except by bill of exceptions.

We do not find by an examination of the record that the instruction was signed by the defendant or his attorney. This was required by the fourth clause of section 324 of the code. But the instruction was the defendant's instruction, given on his motion, and properly excepted to by the opposite party. We do not think the defendant can be heard to say that the plaintiff could not make the instruction a part of the record without a bill of exceptions, as provided for by section 325 above quoted, because of the failure of the defendant or his attorney to sign the instruction thus procured by him to be given. If the instruction had been refused, and the defendant were complaining of the refusal, the plaintiff might well object that it was not

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signed by the defendant or his attorney, whether it was contained in a bill of exceptions or otherwise, as the failure to sign might be good ground for a refusal to give it.

The defendant procured the instruction to be given, and the plaintiff excepted in the manner prescribed by the section of the statute above quoted. This, we are clear, made the instruction a part of the record, without a bill of exceptions.

It is insisted, as we understand the petition for a rehearing, that this court can not know that the charge was read to the jury, or filed; and that the statement in the transcript, that "The following are the instructions of the court above referred to," is a mere statement of the clerk, and no part of the record.

To this it may be answered, that it is provided by section 324 of the code, above referred to, that "All instructions given by the court must be signed by the judge, and filed, together with those asked for by the parties, as a part of the record." Such instructions become, therefore, a part of the record. If they are given, and exception taken in the manner provided for by section 325, as in this case, these facts appear upon their face, and the instructions speak for themselves. The note of the filing marked on them by the clerk is sufficient evidence of the filing. And they being a part of the record, the clerk, in making out a transcript, may properly make such statement as will identify them, as he may in reference to any pleading in the cause, or other legitimate part of the record.

The petition for a rehearing is overruled.

NOTE.—BIDDLE, J., was absent when this petition was considered.

The State v. Snyder.

THE STATE v. SNYDER.

CRIMINAL LAW.—*False Pretences Used to Obtain Board and Lodging.*

—*Indictment.*—The use of false representations by a third person, as to his property, by means of which, with intent to defraud, he obtains board and lodging, is within section 27 of the felony act, 2 R. S. 1876, p. 436, defining the crime of obtaining goods by false pretences. See opinion for indictment.

SAME.—*Defendant's Knowledge of Falsity of Pretences.*—The charge, in an indictment for such crime, that the false representations were "designedly" made with intent to defraud, imputes to the defendant a knowledge of the falsity of his representations.

From the Allen Criminal Circuit Court.

T. W. Woollen, Attorney General, and *S. M. Hench*, Prosecuting Attorney, for the State.

R. S. Stratton, for appellee.

Howe, J.—In this case, the appellee was indicted upon a charge of having obtained his boarding and lodging for one week, by means of certain false pretences. The indictment contained two counts, as to the second of which counts the State, by its prosecuting attorney, with leave of the court, entered a *nolle prosequi*. The appellee moved the court to quash the first count of the indictment, upon the ground that it did not state facts sufficient to constitute a crime, under the laws of this State, which motion was sustained by the court, and to this decision the State, by its attorney, excepted.

From the decision of the court, in quashing the first count of the indictment, the State has appealed to this court, and has here assigned this decision as error. The only question for our decision, therefore, is this: Did the first count of the indictment against the appellee state facts sufficient to constitute a crime, under the laws of this State?

Omitting the venue and title of the cause, the first count of the indictment was in the words and figures following, to wit:

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“The grand jurors for the county of Allen, and State of Indiana, upon their oath charge and present, that on the twenty-third day of May, A. D. 1879, Charles Snyder, at said county of Allen, feloniously, designedly and with intent to defraud one Anna E. Furgeson, did falsely pretend to the said Anna E. Furgeson, that one Peter Kiser owed him between twelve hundred and fifteen hundred dollars, and that said money was on interest, and that he, the said Charles Snyder, owned a house and lot on Wayne street, in Fort Wayne, meaning in the city of Fort Wayne, Indiana, near his uncle Peter's, meaning Peter Kiser, by means of which said false pretences, the said Anna E. Furgeson relying upon and believing the same to be true, the said Charles Snyder did then and there feloniously and designedly obtain from said Anna E. Furgeson boarding and lodging for one week, said boarding and lodging being of the value of five dollars, and said Anna E. Furgeson being then and there the proprietor and manager of a boarding house, in the city of Fort Wayne, in said county and State, said boarding and lodging being then and there the property of said Anna E. Furgeson; whereas, in truth and in fact, the said Charles Snyder was not then and there the owner of a house and lot on Wayne street, in Fort Wayne, meaning the city of Fort Wayne, Indiana, near his uncle Peter's, meaning Peter Kiser, and whereas, in truth and fact, the said Peter Kiser did not then and there owe the said Charles Snyder between twelve hundred and fifteen hundred dollars, nor any sum or amount; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.”

The question for decision, in this case, has been ably and elaborately argued by the learned attorney for the State; but, as too often happens in such cases, we have no brief from the appellee, in this court. We are entirely dependent, therefore, for information in regard to the grounds of

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the decision of the court below, upon the brief of the prosecuting attorney. It will be readily seen from the first count of the indictment, that it was intended therein, and attempted thereby, to charge the appellee with the commission of the felony which is defined in section 27 of "An act defining felonies, and prescribing punishment therefor," approved June 10th, 1852, 2 R. S. 1876, p. 436. This section has often been the subject of judicial construction, and one of the two objections urged to this indictment in the court below, as we learn from the brief of the State's attorneys, namely, the insufficiency of the facts stated to constitute false pretences, under the statute, has often been insisted upon in other cases decided by this court. On this point, in the case of *Clifford v. The State*, 56 Ind. 245, it was said by this court: "It is true, that it is not every false pretence, on which a criminal charge may be predicated; but such false representations of alleged existing facts, as might deceive the man of common intelligence, will support an indictment for obtaining goods under false pretences, and in such a case the party indicted ought not to be permitted to escape the punishment prescribed for the offence, upon the plea that a prudent or cautious man would not have been deceived by his false representations." *The State v. Magee*, 11 Ind. 154; *Leobold v. The State*, 33 Ind. 484; *Jones v. The State*, 50 Ind. 473; *The State v. Timmons*, 58 Ind. 98.

The second objection, urged by the appellee to the indictment in this case, as we are informed by the brief of the prosecuting attorney, was that the first count of the indictment, the only count before this court, was fatally defective because it contained no charge that the defendant, the appellee, knew that the false pretences, upon which the count was predicated, were false in fact. This objection to the first count of the indictment presents a question for decision, which

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may be thus stated: Is it necessary that it should be charged, in an indictment for obtaining money or any thing of value, by means of alleged false pretences, that the defendant knew that the pretences were false? In this State, it is a general rule in criminal pleadings, so often recognized in the decisions of this court as to render unnecessary a citation of the cases, that where the particular act or acts constituting the offence are clearly defined in the statute, it will be sufficient to charge the offence, in the indictment, in the language of the statute. It seems to us, that this general rule is and ought to be applicable, in all its force, to the offence charged in the first count of the indictment; in this case; for this offence and the particular acts constituting the same are clearly and specifically described in section 27 of the felony act, approved June 10th, 1852.

In this section 27 it was provided, that, "If any person, with intent to defraud another, shall designedly, by color of any false token or writing, or any false pretence, obtain the signature of any person to any written instrument, or obtain from any person any money, transfer, note, bond or receipt, or thing of value; such person shall, upon conviction thereof, be imprisoned in the state-prison not less than two nor more than seven years, and fined not exceeding double the value of the property so obtained." 2 R. S. 1876, p. 436.

It will be seen from the first count, hereinbefore set out, of the indictment in this case, that the defendant, the appellee, is therein charged with the commission of the felony defined in said section 27, in almost the exact language of the section. It seems to us that the offence is charged in the first count, in this case, with sufficient clearness and certainty; for, when it is alleged, as it is in this case, that the defendant "feloniously, designedly and with intent to defraud," etc., "did falsely pretend," etc., the implication from the language thus used is so

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strong as to amount to an express charge of a *scienter*, that he *knowingly* did falsely pretend, etc. The defendant could not, we think, designedly intend to defraud, by means of false pretences, unless he knew that the pretences were false; and the charge that he *designedly* intended to defraud, etc., necessarily, *ex vi termini*, included the charge that he *knowingly* intended to defraud, etc. Where a design and an intent to defraud by false pretences exist as charged, there must of necessity exist a knowledge of such intent, and that the pretences are false.

We learn from the brief of the prosecuting attorney, that the court below probably relied upon the language used by this court, in the case of *The State v. Smith*, 8 Blackf. 489, in quashing the first count of the indictment, in the case at bar. In the case cited it was said: "It appears to us that it" (the indictment) "should have contained the allegation that Smith knew," etc. The substance of the indictment under consideration is set out in the opinion in that case; and it would seem therefrom, that the technical terms of the statute, "designedly and with intent to defraud," had been omitted from that indictment, in charging the offence. The indictment in the case cited had been found under section 24 of chapter 53 of the Revised Statutes of 1843, p. 965; but it will be seen that this section 24, which defined the felony of obtaining goods, etc., by false pretences, is almost identical in its verbiage and phraseology, with section 27 of the felony act of June 10th, 1852, which latter section is set out in this opinion. If, in the case at bar, the first count of the indictment had not charged the offence in the language of the statute, which language, as we have seen, clearly imported a *scienter* on the part of the defendant, then it would have seemed to us that this objection to the first count would have been well taken, and was properly sustained; for we are clearly of the opinion, that a

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knowledge on the part of the defendant of the falsity of his pretences is a necessary ingredient of the felony charged; but, as before stated, where, as in this case, it is charged that the defendant designedly and with intent to defraud, etc., did falsely pretend, etc., we think that the knowledge of the defendant of the falsity of his pretences is necessarily implied, and appears with sufficient clearness and certainty to comply with the rules of criminal pleading established by the criminal code of this State and the decisions of this court.

In conclusion, we hold that the appellee's objections to the first count of the indictment, in this case, were neither of them well taken, and that the court below erred in quashing this count, on the appellee's motion.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to overrule the motion to quash the first count of the indictment, and for further proceedings in accordance with this opinion.

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66	208
130	381
66	208
158	92

33	208
1171	315

PLEADING.—*Copy of Instrument sued on.*—*Judgment on Complaint containing Good and Bad Paragraphs.*—*Supreme Court.*—One paragraph of a complaint counted upon a written agreement alleged to have been executed by the defendant and a debtor, agreeing to pay a debt due from the latter to the plaintiff; but the paragraph, though purporting to, did not, contain a copy of the agreement.

Held, on demurrer, that the paragraph is insufficient.

Held, also, the record not showing upon which paragraph judgment was rendered against the defendant, that the judgment can not be upheld.

From the Vanderburgh Circuit Court.

C. Denby, D. B. Kumler and J. E. Williamson, for appellant.

A. Dyer, W. M. Blakey and A. Pfafflin, for appellee.

PERKINS, J.—Suit by the appellee, against the appellant, upon a written agreement by the latter to pay to the for-

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mer a debt due to him by Nancy J. Gatch; said agreement, it is averred, was signed by said Gatch and Cook, and accepted by said Hopkins. The suit was founded upon that agreement, and the first paragraph of the complaint purported to make said written agreement a part thereof, but did not, nor was it, or a copy of it, filed with the complaint.

A demurrer was overruled to this paragraph of the complaint, and exception entered.

Answer; issue; judgment for the plaintiff, on the complaint.

The court erred in overruling the demurrer to the first paragraph of the complaint. That paragraph was bad. *The Peoria, etc., Ins. Co. v. Walser*, 22 Ind. 73; *Williamson v. Foreman*, 23 Ind. 540; *Stafford v. Davidson*, 47 Ind. 319; *Figart v. Halderman*, 59 Ind. 424.

Here, then, was a judgment upon a complaint containing one bad paragraph.

At common law such judgment might not be upheld. Under the code of 1843 it might be. But, under the present code, it is erroneous.

In *Schafer v. The State*, 49 Ind. 460, it is said: "It is the settled rule of practice of this court, that where a cause has been tried on issues joined upon a complaint containing two or more paragraphs, some defective and others good, a demurrer to the former having been overruled, the record not showing that the cause was tried and the judgment rendered exclusively upon the good paragraphs, the judgment will be reversed for error in overruling the demurrers to the defective paragraphs." *The Evansville, etc., Co. v. Wildman*, 63 Ind. 370, follows *Schafer v. The State*, *supra*.

The judgment is reversed, with costs; cause remanded for further proceedings in accordance with this opinion.

Turner v. The State, *ex rel.* Divine.

TURNER v. THE STATE, EX REL. DIVINE.

BASTARDY.—*Recognizance for Continuance.*—*Liability of Surety on.*—A prosecution for bastardy may be prosecuted to final judgment in the circuit court, notwithstanding the absconding of the defendant during the pendency of the prosecution before the justice of the peace in whose court it was instituted; and an action for the recovery of the sum so adjudged may be maintained by the relatrix, in the name of the State, on a recognizance executed by the defendant and a surety to obtain a continuance before the justice.

SAME.—*Complaint.*—If the complaint in such action does not allege that such prosecution was duly prosecuted to final judgment in the circuit court, for the recovery of money by the relatrix, the complaint is insufficient on demurrer.

SAME.—*Surety can not Limit his Liability.*—*Defective Bond.*—The surety on a recognizance for a continuance of a prosecution for bastardy can not limit his liability on such bond to a mere failure of the defendant to appear, but is liable thereon, notwithstanding such a limitation in the condition of the bond, "to the full extent contemplated by" sections 4 and 8 of the bastardy act, 2 R. S. 1876, pp. 656, 657.

SAME.—*Answer.*—An answer in such action, that the defendant had appeared, as recognized, before the justice, and had there remained until a judgment had been rendered against him, and then, under permission of the justice to depart to find surety, had absconded, is insufficient.

From the Decatur Circuit Court.

J. D. Miller and F. E. Gavin, for appellant.

Howk, J.—In this action, the appellee, on the relation of Sarah Divine, as plaintiff, sued the appellant and one William Kirby, as defendants, in a complaint of a single paragraph, wherein it was alleged, in substance, that, on the — day of October, 1875, the appellee, on the relation aforesaid, filed before a justice of the peace of Decatur county, Indiana, a verified complaint, in which it was averred, that said Sarah Divine, an unmarried woman, was pregnant of a bastard child, of which the defendant, William Kirby, was the father; that, upon said complaint, the justice issued his warrant for the arrest of said Kirby, and he was then and there duly arrested and taken before said justice to answer said complaint; that, to relieve himself

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from custody thereon, the said Kirby, with the appellant as his surety, on the 13th day of October, 1875, executed a written undertaking, a copy of which was therewith filed, which undertaking was then and there accepted and approved by said justice, in the sum of two hundred dollars, and was conditioned that said Kirby should appear before said justice at 10 o'clock A. M. of the 14th day of October, 1875, to answer said complaint, and abide by and perform the order and judgment of said justice in that behalf; that said Kirby did not appear and abide by said order and judgment of said justice in said cause, but, on the contrary, he absented himself and fled, and though three times called in said cause he made default and refused to appear therein; that the appellant, having been called in like manner and required to produce the body of said Kirby, also made default, and thereby the said bond became and was then forfeited, and judgment of forfeiture thereof was then and there duly rendered by said justice; that, by reason of the premises, an action had accrued to the appellee to demand and have the said sum mentioned in said bond, which sum was then due and unpaid; and that, for the use and on the relation aforesaid, the appellee demanded judgment for said sum of two hundred dollars and for all other proper relief.

The undertaking or bond, sued on in this action, was in the words and figures following, to wit:

“The undersigned are bound unto the State of Indiana in the sum of two hundred dollars, subject to the condition following: Whereas, in a proceeding by the said State, on the relation of Sarah Divine, against the undersigned William Kirby, on a charge of bastardy, before Green B. Roszell, a justice of the peace of Washington township, in Decatur county, Indiana, the said justice has this day required the said William Kirby to enter into a recognizance bond. Now, if the said William Kirby shall

appear in the office of said justice on to-morrow morning, at 10 o'clock A. M., to answer said charge, and not depart said court without leave, this bond shall be void, else in full force and effect. Dated the 13th day of October, 1875.

The defendant Kirby was not served with process in this action; but the appellant appeared and demurred to the complaint, for the alleged insufficiency of the facts therein to constitute a cause of action. This demurrer was overruled by the court, and to this ruling the appellant excepted. He then, answered the complaint and alleged, in substance, that he signed the bond in suit as the accommodation surety of his codefendant, Kirby, and for no other consideration whatever; that said Kirby did, as required by the terms of said bond, appear at the office of said justice, at the time mentioned in the bond, to answer said charge, and that thereupon such proceedings were had, as that said justice heard said cause, and it was by him considered and adjudged that said Kirby was the father of said bastard child; that, after the finding had been announced, but before it was entered, the said Kirby, with leave of the justice, left his office for the purpose of procuring some one to become his surety in a recognizance for his appearance in the Decatur Circuit Court at its next term, the appellant having declined to become his surety; and that, while so absent, the said Kirby, without the appellant's knowledge or consent, departed this State. Wherefore the appellant asks to be discharged, with his costs.

To this answer the appellee's demurrer for the want of sufficient facts was sustained by the court, and to this decision the appellant excepted, and, declining to answer over, the court heard the proofs adduced by the appellee,

and thereon found for the appellee the full amount of the bond in suit and rendered judgment accordingly, to the rendition of which judgment the appellant excepted, and appealed therefrom to this court.

The following decisions of the circuit court have been assigned by the appellant, in this court, as errors :

1. The overruling of his demurrer to appellee's complaint ;
2. The sustaining of the appellee's demurrer to the appellant's answer ; and,
3. The rendition of judgment against the appellant.

We will consider and decide the several questions presented and discussed by the appellant's counsel in their brief of this case, and arising under these alleged errors, in the order of their assignment.

1. The bond in suit was taken by the justice of the peace, before whom the appellee's relatrix, Sarah Divine, had filed her complaint in bastardy against the defendant William Kirby, under and pursuant to the provisions of section 8 of "An act regulating prosecutions in cases of bastardy, and providing for the support of illegitimate children," approved May 6th, 1852. In this section 8, it was provided that, "Upon any continuance granted either party, the court or justice granting the same shall require of the defendant a like bond as is required in the fourth section of this act," etc. 2 R. S. 1876, p. 657. In the 4th section of said act, it is provided that if the justice, on the hearing, adjudge the defendant to be the father of the child, he shall, if the defendant is in custody, require him to give bond in a sum not less than two hundred nor more than ten hundred dollars, and conditioned that he will appear at the next term of the circuit court of the county to answer such complaint, not depart without leave, and abide the judgment and order of such court, or, failing therein, that he will pay such sums of money, and to such

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person, as may be adjudged by such court. The closing sentence of this 4th section is in these words: "Such bond, or any bond given by such defendant on any continuance or arrest may be put in suit by any person in whose favor the court may adjudge any sum of money, in such prosecution." 2 R. S. 1876, p. 656.

It is upon this closing sentence of said 4th section of the bastardy act, that the appellant's counsel have founded their argument upon the point that the facts stated in the appellee's complaint are not sufficient to constitute a cause of action. The bond in suit, as we have seen, is payable in terms to the State of Indiana; and the only provision for the enforcement of the bond by suit, to be found in our statutes, is the one above quoted. By implication, if not by fair construction, it seems to us that, under the language of the statute, such a bond can only be put in suit by some person in whose favor the court may adjudge a sum of money, during or in the prosecution.

In section 15 of the bastardy act, as amended by an act approved March 5th, 1877, Acts 1877, Reg. Sess., p. 5, it is provided, that, if the defendant in a bastardy case is adjudged to be the father of the child, the court shall make such order as may seem just, for securing the maintenance and education of the child, by the annual payment to the mother, "or if she be dead, or an improper person to receive the same, to such other person as the court may direct, of such sums of money as may be adjudged proper, and shall render judgment for the same," etc. 2 R. S. 1876, p. 657.

It seems to us, that the sums of money mentioned in this section 15 are the sums of money for which such a bond as the one sued on in this action may be put in suit by the person in whose favor the court may adjudge such sums of money as provided in the closing sentence, above quoted, of section 4 of the bastardy act.

It will be seen from our statement of the substance of appellee's complaint, that it contained no averment to the effect that the proper court had ever adjudged the payment, either to the appellee's relatrix or to any other person, of any sum of money. The omission of an averment, that the court had, in the bastardy case, adjudged the payment to the relatrix of a certain sum or sums of money, in our opinion, rendered the complaint in this case fatally defective, on the appellant's demurrer thereto for the want of sufficient facts. In the absence of such an averment, we are clearly of the opinion that the complaint did not state facts sufficient to show a cause of action in favor of the appellee's relatrix; for, until the proper court had adjudged, in the bastardy case, the payment to the relatrix of a sum or sums of money, she could not, under the statute, as we construe its provisions, maintain any action on the bond in suit. It may be remarked in this connection, that no reason is given in the appellee's complaint in this action, for the apparent failure of the relatrix to obtain a judgment in the circuit court, for the payment to her of such sums of money as the court might adjudge proper, as she might have obtained such judgment, if not an improper person, under the laws of this State. For the reasons given, we hold that the court erred in overruling the appellant's demurrer to the appellee's complaint.

2. It seems to us, that the court committed no error in sustaining the appellee's demurrer to the appellant's answer. The statute required, that, upon the continuance of the cause before the justice, he should require of the defendant a bond, conditioned that he would appear at the time specified to answer the complaint, not depart without leave, and abide the judgment and order of the justice. This was not the condition expressed in the bond in suit, but it was the condition required by the statute; and as the bond was taken by the justice in the discharge of his official

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duty, it must be held, we think, that both Kirby and the appellant, as his surety, under the provisions of section 790 of the practice act, were bound by such bond, "to the full extent contemplated by the law requiring the same." 2 R. S. 1876, p. 311.

It was not alleged by the appellant in his answer, that the defendant Kirby abided the judgment and order of the justice, as the bond, under the law, required him to do; but the allegation was, that the said Kirby, with the leave of the justice, left his office to procure a surety on a bond for his appearance in the circuit court, and that, while so absent, the said Kirby, without the appellant's knowledge or consent, had departed this State. This allegation was not sufficient, as it seems to us, to show a compliance by Kirby and the appellant with the condition of the bond in suit, under the requirements of the statute. *Railback v. Greve*, 58 Ind. 72; *Miller v. McAllister*, 59 Ind. 491.

3. No allusion is made by the appellant's counsel, in their brief of this cause, to the third alleged error. It must therefore be regarded as waived.

The judgment is reversed, at the costs of the appellee's relatrix, and the cause remanded, with instructions to sustain the appellant's demurrer to the complaint, and for further proceedings in accordance with this opinion.

66	216
147	226
66	216
167	176

THE STATE, EX REL. THE ATTORNEY GENERAL, ET AL. v. THE
BOARD OF COMMISSIONERS OF NEWTON COUNTY.

NEW TRIAL.—*Agreed Case.*—A motion for a new trial is unnecessary in an action tried under section 886 of the practice act, on an agreed statement of facts.

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FEES AND SALARIES.—*Statutes Construed.*—*Docket Fees belong to State, and not to County or Clerk.*—The docket fees taxed to the losing party by the clerk under the fee and salary acts of Feb. 21st, 1871, March 8th, 1873, and March 12th, 1875, did not belong to him, but were to be paid over by him into the county treasury ; and, under section 6 of the act of March 5th, 1859, 1 R. S. 1876, p. 775, such fees must be paid over to the State as her property.

From the Newton Circuit Court.

C. A. Buskirk, Attorney General, and *A. Hall*, for appellants.

J. R. Troxell, for appellee.

BIDDLE, J.—The State, on the relation of the Attorney General, sued the Board of Commissioners of Newton County and Andrew Hall, the clerk of the Newton Circuit Court, for certain docket fees collected by said clerk, which he claimed as his own fees, and which were also claimed by the board of commissioners as belonging to the county. The case was tried by the court upon an agreed statement of facts, and a finding had in favor of the board of commissioners, against the State and the clerk. The State and clerk separately moved for a new trial, on the ground that the finding of the court was not sustained by the agreed statement of facts, and was contrary to law. Both motions were overruled, and both parties excepted. Both parties also move for judgment on the finding—the State in its favor, and Hall in his favor—but the court overruled the motions and rendered judgment on the finding, to which both parties excepted, and have both appealed.

This case was tried under section 386 of the code, 2 R. S. 1876, p. 190, which authorizes parties to submit any matter of controversy between them upon an agreed case, whereupon the court shall proceed to try the same and render judgment as in other cases. Under this section it is not necessary to move for a new trial, because the facts agreed to would necessarily be the same on a second trial

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as they were upon the first, and thereby nothing would be gained. *Fisher v. Purdue*, 48 Ind. 323.

The agreed statement of facts is quite too long, with its schedules of fees in detail, to set out at length, but may be condensed, and still fairly present the case, as follows:

Andrew Hall was clerk of the Newton Circuit Court, from the 21st day of February, 1871, until the 21st day of April, 1876. During his term of office he collected docket fees to the amount of \$102, under the act of Feb. 21st, 1871, sec. 16, Acts 1871, p. 30. He collected docket fees to the amount of \$726.00, under the act of March 8th, 1873, sec. 4, Acts 1873, p. 121; and also collected docket fees to the amount of \$70.00, under the act of March 12th, 1875, 1 R. S. 1876, p. 468, sec. 5; making in all the aggregate sum of \$898.00. This amount Hall claims as his own, but paid it into the county treasury, under protest, and subject to the decision in this case. These facts, with the acts cited, sufficiently present the question under consideration.

The argument presented in favor of Hall is as follows:

"1. That in authorizing the clerk to tax and collect docket fees in the acts of 1871, 1873 and 1875, the Legislature intended such fees to be taxed for services performed by the clerk; that this intent was legitimate and proper and expressed in the manner prescribed in the constitution, and has the force of law.

"2. That the direction to pay fees 'into the county treasury' or 'to the county treasurer,' not being in harmony with the purpose of the law, was inadvertently placed therein, and does not represent the true legislative intent, and has not, therefore, the force of law.

"3. That the Legislature, having authorized the clerk to tax and collect a fee for a service by him performed, has not the constitutional power to compel him to pay that fee into a public treasury for a public use, without compensation; but, if it had such power, and intended in this case

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to exercise it, it has not indicated such intent in the manner prescribed by the constitution, and it is therefore void."

We do not concur with this reasoning, as applied to these laws. It is true that the sections which provide for docket fees, in the several acts above cited, state that the clerk shall tax certain fees, "for the services by them performed," amongst which the docket fee is mentioned; but, as to the docket fees, each of the same sections expressly enacts that they are "to be paid into the county treasury." The remaining items of fees expressed in these sections, for which the clerk performs services, belong to the clerk; but the express enactment, as to docket fees, for which he performs no services, that the clerk shall pay them into the county treasury, is wholly inconsistent with property in the fees as belonging to himself. Nor can we perceive any reason why they should go to the clerk. They are not for services by him performed, as expressed in the sections. They are incident to the losing party, and are not "clerk's fees," in any fair sense of the meaning of words. This question is incidentally decided in the following cases: *The Board of Commissioners of Fountain Co. v. La Tourette*, 60 Ind. 460; *The State v. Record*, 56 Ind. 107.

But the State also claims the docket fees.

By section 6 of the act of March 5th, 1859, 1 R. S. 1876, p. 775, the clerk of each circuit court is required to pay to the treasurer of his county all docket fees received by them on account of the business of the court, which the treasurer, in the language of the statute, shall pay "into the state treasury, at his annual settlement for state revenue."

This act governs the disposal of the docket fees in question. All the subsequent acts, fixing the amount of fees and salaries, must be held as passed in reference to this act; and, as they do not repeal or change the former act

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in this respect, it was not necessary to re-enact the section requiring docket fees in the circuit court to be paid into the State treasury. During twenty years, we believe, the legislative, executive and administrative departments of the State government have so understood and applied the law; and this, in our opinion, is its correct interpretation. The payment of the docket fees into the county treasury, under the law, would no more make them the property of the county, than the payment of the State revenue into the county treasury, according to law, would make that also the property of the county.

The judgment is reversed, at the costs of the appellees, and the cause remanded, with instructions to render judgment in favor of the State according to this opinion.

Petition for a rehearing overruled.

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CONTINUANCE.—*Absent Witness.*—*Affidavit.*—*Diligence.*—An affidavit for a continuance on account of the absence of a witness alleged the issuance of a subpoena for the witness, and the return of "not found," on the day the cause was set for trial, and that the witness was temporarily residing at a place named, within the State.

Held, that there had not been due diligence in attempting to procure the attendance or deposition of the witness.

From the Marion Circuit Court.

D. V. Burns, for appellants.

C. C. Nave and *C. A. Nave*, for appellees.

PERKINS, J.—Suit by the appellees, against the appellants, upon a bill of items of an account for services rendered the appellants.

Answer in two paragraphs, denial and payment; issue; trial by jury; judgment for the plaintiffs, appellees.

Motion for a new trial overruled and exceptions reserved.

The error assigned is, that the court erred in overruling the motion for a new trial. The ground of the motion for a new trial was, that the court erred in refusing a continuance of the cause upon the following affidavit :

“ Patrick C. Leary, who, being duly sworn, upon his oath, says, that he is one of the defendants in the above entitled cause ; that the defendants can not safely go into the trial of said cause in this court on this day, by reason of the absence of one Edward Connelly, who is a competent, proper and material witness for them upon the trial of this cause ; that he expects to be able to prove by said witness, upon the trial of this cause, that the demand and claim sued upon in this action was, long before the commencement of this suit, fully paid and satisfied to said plaintiffs ; that he knows of no other witness by whom said fact can be proven ; that he believes said fact to be true so expected to be proven by said witness. Affiant further shows that said witness now is, and continually for more than five years last past hath been, a resident of the city of Indianapolis, Marion county, Indiana ; that, on the 20th day of February, 1877, he caused a subpoena to issue out of the office of the clerk of this court, directing and commanding said witness to appear and testify as a witness for this affiant upon the trial of said cause ; that said subpoena had been returned “ not found,” and as to said fact reference thereto is now made ; and that said witness is absent from this court, and, as affiant is informed and believes, is absent from this county, and is now in the city of Lafayette temporarily ; that, if a reasonable time be given him, he can procure the personal attendance of said witness, or his deposition, upon this trial ; that the absence of said witness has not been procured by any act or connivance of this affiant, nor by the act of any other per-

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son or persons with his knowledge or consent. Wherefore he asks that this cause be continued for such reasonable time as the court may deem proper in the premises.

“ ‘PATRICK C. LEARY.

“ ‘Subscribed and sworn to before me this 24th day of February, 1877. AUSTIN H. BROWN, Clerk.’

“ Which motion the court overruled, and to which ruling the defendants, at the time excepted, and presented this their bill of exceptions, which they pray may be signed and sealed by the court, and made a part of this record in this cause, which is accordingly done. The cause had been set for trial for the 20th of February, and the same having been so set as early as February 13th, none of the causes for the 20th having been reached until February 24th, 1877. J. B. JULIAN, Judge.”

This cause was commenced in July, 1873, was put at issue at the September term, 1873; was continued by agreement at the January term, 1874. A change of venue was applied for and granted, but never perfected. Afterward, on the 5th of December, 1876, the cause was again continued. Afterward, at the February term, 1877, another motion, that above set forth, was made for a continuance and denied.

The affidavit lacks certainty and precision; and we think it fatally defective in failing to state that the affiant was ignorant of the fact that the desired witness was in Lafayette, and of the length of time he had been there, etc. If he was not so ignorant, he might have procured the attendance of the witness or his deposition. We think due diligence was not shown. The subpoena was not issued till the day set for trial. *Ward v. Colyhan*, 30 Ind. 395; *Wolcott v. Mack*, 53 Ind. 269.

The judgment is affirmed, with costs.

Opinion filed and petition for a rehearing overruled at November Term, 1878, but papers off the files.

THE STATE v. HATTABOUGH.

CRIMINAL LAW.—*Appeal by State to Supreme Court.*—*Appearance.*—*Waiver of Notice of Appeal.*—An appearance and joinder in error by the defendant in a criminal prosecution, in the Supreme Court, on appeal thereto by the State, is a waiver of notice of the appeal.

SAME.—*Jurisdiction of Justice in Felonies.*—A justice of the peace has no jurisdiction to either acquit or convict a defendant charged with a felony, his only authority in such case being that of an examining court, to hear and discharge, or commit and bind over to appear before a court having jurisdiction to try.

SAME.—*Discharge no Bar to Subsequent Prosecution.*—A discharge by the justice, in such case, is no bar to a subsequent prosecution of the defendant, for the same offence.

SAME.—*Misdemeanor merged in Felony.*—*Assault and Battery with Intent to Murder.*—*Former Acquittal or Conviction.*—The misdemeanor known as assault and battery, when committed in connection with an attempt to murder, is merged in the felony known as assault and battery with intent to murder, and an acquittal or conviction of the misdemeanor, though by a court of competent jurisdiction, is no bar to a prosecution for the felony; but, in such case, if the intent to murder be not established, such acquittal or conviction will bar a conviction of the assault and battery.

BIDDLE, J., dissents.

SAME.—*No Conviction of Assault and Battery on proof of Assault, etc., with Intent, etc.*—One on trial for simple assault and battery can not be convicted on evidence establishing him guilty of assault and battery with intent to murder.

SAME.—*Trial for Offence including Offences of less Degree.*—A defendant on trial for an offence which necessarily includes another offence or lesser degrees of offence is on trial for the latter as well as the former, and can not be subsequently convicted thereof.

From the Washington Circuit Court.

T. W. Woolen, Attorney General, F. L. Prow, Prosecuting Attorney, A. F. Ayres, S. B. Voyles and J. B. Brown, for the State.

H. Heffren, J. A. Zaring, G. W. Paul and J. E. Humphries, for appellee.

WORDEN, C. J.—The appellee in this case has moved to dismiss the appeal on the alleged ground of the insufficiency of the notice of appeal.

66	223
128	168
66	223
141	121
66	223
145	307
66	223
156	250
156	448
66	223
166	590

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We have not considered the objection made to the notice given, because the appellee has appeared to the cause in this court, and joined in error. It is therefore immaterial whether any notice was given. The appearance and joinder in error are a waiver of notice of the appeal. The motion must be overruled.

The appellee was indicted in the court below for an assault and battery upon the person of Reason Lane, with intent thereby to unlawfully, feloniously, purposely, and with premeditated malice, kill and murder him.

The appellee pleaded as follows :

"The defendant, William Hattabough, in his own proper person, comes now into open court, and having heard the said indictment read against him, so found and returned as shown therein, says that the State of Indiana ought not further to prosecute the said indictment against him, because, he says, that heretofore, to wit, on the 7th day of January, 1879, before one William H. Gregory, a duly elected, commissioned and qualified justice of the peace in and for Washington county, State of Indiana, that he, said William Hattabough, was charged upon oath by one John F. Johnson, with an assault and battery upon the person of Reason Lane, at the county and State aforesaid, upon the 6th day of January, 1879; that he appeared in court and voluntarily surrendered himself to the custody of the court, entered a plea of guilty to the said charge and was fined one dollar and costs of suit; that said judgment was paid in full by said defendant, and is in full force and not appealed from; that the assault and battery now complained of in said indictment for assault and battery with intent to murder Reason Lane is the same identical charge of assault and battery, upon which he was charged and fined before the said Gregory aforesaid; and this he is ready to verify. Wherefore," etc.

The State filed a demurrer to the plea, which was over-

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ruled, and the State excepted. The defendant was discharged.

The State appeals, and has assigned error upon the ruling on the demurrer.

The crime charged in the indictment is a felony, while a simple assault and battery is only a misdemeanor. Justices have no jurisdiction to try felonies. In respect to the latter grade of offences they have only the powers of an examining court, and can neither acquit nor convict thereof. They can only hear and commit or bind over the accused to answer before a court having jurisdiction to try the offence, or discharge the accused, as the evidence may warrant; and a discharge by a justice does not prevent another prosecution. *The State v. Morgan*, 62 Ind. 35.

But justices have jurisdiction to try simple assaults and batteries and a conviction or acquittal before a justice, of such an offence, will bar another prosecution for the same cause.

With this general statement of the law, we come more directly to the question involved: Is a conviction or an acquittal before a justice of the peace, of an assault and battery, a bar to a prosecution for the same assault and battery with intent to commit a felony?

To free the question from any confusion of ideas in respect to the jurisdiction of justices, we think it may be stated as follows: Does a conviction or an acquittal of a simple assault and battery, before a court of competent jurisdiction to try the same, bar a subsequent prosecution for the same assault and battery with intent to commit a felony?

This question must, in our opinion, be answered in the negative, on principles which we regard as well established, though there are some authorities that seem to support a contrary doctrine.

The constitution provides, that "No person shall be put in jeopardy twice for the same offence."

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By the prosecution for the assault and battery, the appellee was not put in jeopardy at all for the offence of assault and battery with intent to commit the murder; while if, upon the trial of the indictment, the State should fail to make out the felonious intent, the appellee could avail himself of the former conviction, so that he could not be punished twice for the same simple assault and battery. *The State v. George*, 53 Ind. 434.

The usual test by which to determine whether the former conviction or acquittal was for the same offence as that charged in the second prosecution, and, therefore, whether the former is a bar to the latter, is to enquire whether the evidence necessary to sustain the latter would have justified a conviction in the former case. *Burns v. The People*, 1 Parker C. C. 182; *The People v. Saunders*, 4 Parker C. C. 196; 1 Wharton Crim. Law, sec. 566; *The State v. Elder*, 65 Ind. 282.

The question arises then, whether, if upon the trial of the cause before the justice it had appeared that the assault and battery had been perpetrated with the intent to commit the murder (a fact necessary to be established in order to support the present indictment), the appellee could have been legally convicted of the simple assault and battery. It is quite clear, under the authorities, that he could not. Neither, on general principles of law, ought he to have been; for, if rightfully convicted, the conviction would bar a subsequent prosecution for the felony, and the supposed felon would escape the punishment due to his crime, suffering only the trivial punishment prescribed for the misdemeanor.

And the reason why a conviction could not have been had upon the former trial is, that the misdemeanor involved in the assault and battery was merged in the felony.

There was no crime of assault and battery as an independent offence. The felony was the crime and the only crime of which the appellee was guilty. Therefore the evi-

dence necessary to sustain the indictment could not have justified a conviction of the simple assault and battery. Hence the appellee was not, by the former prosecution, put in jeopardy for the crime charged in the indictment.

The doctrine of merger in such case, though it has been in some instances called in question, is too thoroughly established in our system of criminal jurisprudence to be abrogated without legislative sanction. Nor is it perhaps desirable that it should be; for if one guilty of a felony may be convicted of the misdemeanor involved in the felony, and thereby escape the punishment due to the felony, by setting up the former conviction, the purpose of the law in prescribing a greater punishment for felonies than misdemeanors will be thwarted. The good of society requires rather that, if charged with the misdemeanor, he should be acquitted thereof, and put upon his trial for the felony.

In reference to the merger we quote the following passage from the opinion of this court, delivered by STUART, J., in the case of *Wright v. The State*, 5 Ind. 527: "Assault and battery, which is simply a misdemeanor, is not included in any of the degrees of homicide. The misdemeanor is merged in the felony. The assault and battery which results in death, must belong either to felonious homicide embraced in murder or manslaughter; or to justifiable or excusable homicide, as the execution of a felon by due course of law, or in a proper measure of self-defence. In either event, the simple assault and battery no longer remains as such to be punished. It is either merged, justified or excused."

The merger of the misdemeanor in the felony is as complete in the case of an assault and battery with intent to commit murder, as where the murder is committed.

We quote the following paragraph from 2 Russell Crimes, p. 1026, 9th ed., as illustrative of the foregoing views:

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"Thus where the defendant was indicted for a misdemeanor, in burning a house in his own occupation, such house being alleged to be contiguous and adjoining to certain dwelling-houses of divers liege subjects, etc.; and the facts of the case, as opened by the counsel for the prosecution, appeared to be that the defendant set fire to his own house, in order to defraud an insurance office, and that in consequence several houses of other persons, adjoining to his own, were burnt down; Buller, J., said that if other persons' houses were in fact burnt, although the defendant might only have set fire to his own, yet under these circumstances the prisoner was guilty, if at all, of felony (the misdemeanor being merged) and could not be convicted in this indictment; and, therefore, he directed an acquittal."

The case before us can not be distinguished in principle from that of *The People v. Saunders*, 4 Parker C. C. 196, above cited.

There the defendant was indicted for a rape, and he pleaded that he had been convicted before a justice of the peace of an assault and battery upon the prosecutrix, and fined \$20, and sentenced to imprisonment for thirty days in the county jail, in case the fine was not paid, and that he had paid the fine; that the assault and battery of which he had been so convicted was the same assaulting, beating and carnally knowing the prosecutrix charged in the indictment, and was one and the same assault and battery, etc. This plea was held bad. The court said, among other things, as follows: "There is another reason why the pleas must be held void. The plea of *autrefois convict* admits the offence charged in the indictment, and as these pleas admit the crime of rape against the defendant, he could not be convicted of assault and battery, for the misdemeanor was merged in the felony." A number of authorities are cited upon the point.

In 1 Wharton Crim. Law, at section 566 above cited, the author says:

“Even where the first trial is for a misdemeanor, and the second for a felony, the test holds good that the plea is sufficient if the evidence requisite to support the second indictment must necessarily have supported a conviction on the first. Where the doctrine of merger obtains, the evidence of the consummated felony would have secured an acquittal on the first indictment, and such acquittal would have been no bar. Thus, it has been said, that where on an indictment for an assault to rob, murder, or ravish, the felony turned out to have been completed, the defendant's acquittal, which the court would have been bound to direct, would have been no bar to an indictment for the felony.”

In *Severin v. The People*, 37 Ill. 414, the court, without entering upon any lengthy discussion of the question, said:

“If an indictable offence has really been committed, we apprehend this conviction for a simple assault and battery can not be pleaded in bar of a prosecution for such offence.”

Assuming, as we must, for the purposes of the question involved, that the appellee was guilty of assault and battery with the intent charged in the indictment, he was not guilty of the simple assault and battery to which he pleaded guilty, as that offence was merged in the felony; and it was his own fault that he was convicted thereon. By a proper defence he could have successfully resisted that prosecution; and, as by that prosecution he was not put in jeopardy regarding the felony, that conviction is no bar to the prosecution for the felony. And, as we have already seen, upon the trial of the cause upon the indictment, the appellee can give in evidence the former conviction; and, in case the court or jury trying the cause should find him not guilty

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of the intent charged, thus leaving the assault and battery a simple one, uncoupled with the felonious intent, the former conviction will be a bar to the prosecution for the simple assault and battery.

We have some statutory provisions that may be supposed to have some bearing upon the question involved, which we proceed to consider. Thus it is provided in sec. 14, 2 R. S. 1876, p. 419, that, "on an indictment for an assault and battery with an intent to commit a felony, the defendant may be convicted of a lesser offence." This, and perhaps some other provisions yet to be noticed, were intended to meet cases where the evidence should not establish the felony, but should establish the less offence, as the assault and battery in cases where that is charged with an intent to commit a felony. A conviction of the less offence could not have been had, without the statute, upon such indictment; hence the statute. *Gillespie v. The State*, 9 Ind. 380.

On page 389 of the same volume are the following provisions :

"SEC. 72. Upon an indictment for an offence consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offence.

"SEC. 73. In all other cases the defendant may be found guilty of any offence, the commission of which is necessarily included in that with which he is charged in the indictment."

The object of all these provisions was to authorize a conviction of the less degree of offence, or of an offence which is necessarily included in that which is charged, where the evidence establishes the less, but does not establish the greater offence.

They can have no bearing upon the case before us ex-

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cept to show that, upon the trial of this cause, the defendant may be acquitted of the felonious intent charged, and convicted of the simple assault and battery, unless he shall establish the former conviction pleaded by him.

Then on page 402 we have the following section :

“SEC. 10. When the defendant has been convicted or acquitted upon an indictment for an offence consisting of different degrees, the conviction or acquittal shall be a bar to another indictment for the offence charged in the former, or for any lower degree of that offence, or for an offence necessarily included therein.”

The section last quoted is but the complement of the previous ones, and its provisions would probably have legally resulted from the others without express enactment. If one is put upon trial for a given offence, on which he may be convicted of a less degree of offence than that charged, or of an offence necessarily included in that charged, he is put upon trial not only for the offence charged, but for the less degree, or the offence necessarily included in that which is charged; and it would seem, on general principles that an acquittal or conviction should bar another prosecution.

The section, however, throws no light upon the question here involved. It provides simply for the effect of an acquittal or conviction in cases where the defendant is charged in the indictment with the higher offence consisting of grades, or which necessarily includes another offence.

No inference can be drawn from that, or any other provision of the statute that we are aware of, of a legislative intent, that when one is put upon trial for a misdemeanor, and the offence turns out to be a felony in which the misdemeanor is merged, he may nevertheless be convicted of the misdemeanor, or that such conviction, if had, would bar a prosecution for the felony.

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The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to sustain the demurrer to the plea.

DISSENTING OPINION.

BIDDLE, J.—Upon a careful consideration of the question, I find it impossible to concur in the opinion of the majority of the court in this case, without sacrificing what seems to me to be a judicial duty. The unqualified doctrine, that a conviction or an acquittal of a simple assault and battery before a court of competent jurisdiction to try the same is not a bar to a subsequent prosecution for the same assault and battery with intent to commit a felony, which I understand to be the basis of the majority opinion, is so repugnant to my judgment that I am constrained to enter my dissenting opinion.

The answer pleaded in this case shows a conviction of the assault and battery in a court of competent jurisdiction to try the same; and the answer avers that it is the same assault and battery now charged against the appellee in the pending indictment, with intent to commit the murder charged. The conviction before the justice of the peace, being before a court of competent jurisdiction to try the case, is as effective as if it had been tried in the circuit court upon indictment, and a conviction had thereon. According to the opinion of a majority of the court, as I understand it, it would necessarily follow, then, that, if the appellee had been indicted and convicted in the circuit court for the simple assault and battery, as stated in the answer he has filed, and afterwards was indicted as he now stands charged, the former conviction could not be pleaded to the present indictment. While it is very clear from our own decisions, that, if the appellee had been indicted in the circuit court for the assault and battery in one count, and for the assault and battery with intent to

commit the murder in another count of the same indictment, or if he had been indicted for the assault and battery with intent to commit the murder in one count, a conviction in either case of the simple assault and battery would be a bar to the higher degree of the crime. *Weinzorpfen v. The State*, 7 Blackf. 186; *Clem v. The State*, 42 Ind. 420; *Fritz v. The State*, 40 Ind. 18; *The State v. George*, 53 Ind. 434.

But the opinion is based upon the doctrine of merger; that the assault and battery is merged in the assault and battery with the intent to commit the murder. If this doctrine be true, that the lower crime is merged in the higher crime, which includes it, then every assault and battery is merged in the assault and battery with intent to commit a felony, and every assault and battery with intent to commit a felony is merged in the felony when the felony is committed.

According to this rule, it would be impossible to convict of any of the lower degrees of the offence, unless they stood alone, uncoupled with the higher degrees of the offence. This is the doctrine of merger in criminal offences, which, as it seems to me, is directly against the following sections of our criminal code:

"SEC. 72. Upon an indictment for an offence consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offence.

"SEC. 73. In all other cases the defendant may be found guilty of any offence, the commission of which is necessarily included in that with which he is charged in the indictment.

"SEC. 74. Counts for murder in the first and second degree, and for manslaughter, may be joined in the same indictment, and on the trial the defendant may be convicted of either offence." 2 R. S. 1876, p. 389.

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According to the doctrine of merger, but for these sections, no conviction could be had in such cases, except for the highest degree of crime charged in the indictment; and, according to our decisions, a conviction or acquittal of the lower degree of the crime in such cases is a bar to subsequent indictment for the higher degree.

It can not be said, that, because the justice of the peace before whom the conviction of assault and battery was had, as set forth in the answer we are considering, had no jurisdiction of an assault and battery with intent to murder, therefore the answer is insufficient. The charge before the justice was simply for an assault and battery, over which he had jurisdiction, and which he was competent to try, and whose judgment is as effective as if it had been had in the circuit court upon indictment, and, I think, just as effective as if, in the circuit court, it had been coupled in the same indictment with the intent to commit the murder, and a conviction had. I agree that, if before the justice the charge had been for an assault and battery with the intent to commit the murder, and he had convicted him of the assault and battery merely, the conviction would have been a nullity.

We have seen by the authorities, that, if the conviction of the assault and battery had been adjudged in the circuit court, upon an indictment charging the assault and battery with intent to murder, it would have been a bar to a subsequent indictment for the assault and battery with the intent to murder; and I cannot understand why a conviction for an assault and battery, founded upon a charge of assault and battery with intent to commit murder, can be made any more effective than a conviction for the same assault and battery, founded upon a charge of assault and battery alone; and when it must be held that the conviction before a justice has the same effect as a conviction in the circuit court, the conclusion seems to me irresistible,

that the answer under consideration is sufficient. And to my understanding the opinion of a majority of the court is inconsistent with itself, for it lays down the rule that "The usual test by which to determine whether the former conviction or acquittal was for the same offence as that charged in the second prosecution, and therefore whether the former is a bar to the latter, is to enquire whether the evidence necessary to sustain the latter would have justified a conviction in the former case;" and authorities are cited in support of the rule. With this rule I concur; I believe it to be the law; but how it can be said that the evidence necessary to convict upon the charge in the indictment before us, which is for an assault and battery with intent to commit murder, would not "justify a conviction in the former case" set up in the answer, which is simply for the same assault and battery, is what I cannot perceive. Surely, evidence which proves an assault and battery with intent to commit murder proves the assault and battery. The intent which makes the crime a felony, whatever may be its moral turpitude, is legally harmless when uncoupled with the assault and battery. Alone, the intent is impalpable and unpunishable. And how the appellee could be tried on the present indictment without putting him in jeopardy twice for the assault and battery set up in the answer, is also what I cannot understand. My learned brother who delivered the opinion of a majority of the court, after laying down the well-settled rule as above, reasoned, as it seems to me, directly against it, as if it were necessary that the evidence which would convict in the former case, should necessarily convict in the latter case. This is reversing the rule. He says: "The question arises, then, whether if upon the trial of the cause before the justice it had appeared that the assault and battery had been perpetrated with the intent to commit the murder" (a fact nec-

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essary to be established in order to support the present indictment), the appellee could have been legally convicted of the assault and battery, it is quite clear, under the authorities, that he could not; neither, on general principles of law, ought he to have been; for, if rightfully convicted, the conviction would bar a subsequent prosecution for the felony." Here the learned judge says, that, if the appellee was rightfully convicted before the justice of the peace, "the conviction would bar a subsequent prosecution for the felony." How can this court say, when the question comes up collaterally, that the conviction before the justice was not rightfully had?

The same judge, in the case of *The State v. George*, 53 Ind. 434, held that a conviction of an assault and battery before a justice of the peace, though upon a bad affidavit, is a good bar to a subsequent prosecution for the same offence. Every presumption is in favor of the record. We can not presume that there was any evidence before the justice showing that the assault and battery was committed with the intent to commit the murder as charged in the indictment. Indeed, in the present case, such a presumption is forbidden by the face of the record, for it shows that the prosecution was simply for an assault and battery, and that the plea to it was "guilty." Upon this plea no evidence was necessary to support the conviction, and we can not presume that any was given, thus showing that the State elected to prosecute the appellee for the assault and battery merely, and to accept his plea of "guilty." The State is therefore bound by the record. She can not prosecute the appellee again for an offence which puts him in jeopardy again for the same offence upon which he has been convicted. The justice had jurisdiction over the subject-matter, and over the person of the defendant, and we can not say that the conviction was not rightfully adjudged; and, being rightful, it is a bar to the indictment

for the same offence. There is nothing in the record showing that the conviction had any thing to do with an assault and battery with the intent to murder, and a subsequent indictment can not change the effect of the record. The former conviction can not be affected by the subsequent indictment, but the subsequent indictment can be answered by the former conviction. It is impossible to convict upon the indictment without convicting twice for the assault and battery.

It was a maxim in the common law of England, that no man was to be put in jeopardy more than once for the same offence, under which it was held that a conviction of manslaughter was a bar to an indictment for murder. 4 Bl. Com. 336.

Wharton, in his treatise on criminal law, in section 565, in discussing this principle, states, "that in cases of felony, where one of the offences is a necessary ingredient or accompaniment of the other, and where the State has selected and prosecuted the former to conviction, there can be no further prosecution on the other," and, after citing authorities in its support, lays down the rule, that "Where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea is generally good, but not otherwise;" and in section 566 he states the rule to be the same when the offences are of different grades,—that "Even where the first trial is for a misdemeanor, and the second for a felony, the test holds good that the plea is sufficient if the evidence requisite to support the second indictment must necessarily have supported a conviction on the first." The question before us now is not whether several offences may not arise out of the same state of facts, and each be punished, but the question is whether the subsequent prosecution necessarily includes the former; if it does, then a conviction on the former is a good bar to the latter.

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Upon the question whether the conviction of a lesser offence will bar the greater offence, in which the lesser is included, we find the following rule stated in 1 Bishop Crim. Law, sec. 1,057 :

“ But where the conviction or acquittal is upon an indictment covering no more than one of the smaller crimes, included, as before mentioned, within a larger, the question arises, whether this will bar an indictment embracing one of the larger. If it will not bar, then the prosecutor may begin with the smallest, where there are several crimes included within one another, and obtain successive convictions, ending with the largest ; while, if he had begun with the largest, he must there stop,—a conclusion repugnant to good sense. Besides, as the larger includes the smaller, it is impossible a defendant should be convicted of the larger without being convicted also of the smaller ; and thus, if he has been already found guilty of the smaller, he is, when on trial for the larger, in jeopardy a second time for the same, namely, the smaller, offence. Some apparent authority, therefore, English and American, that a jeopardy for the less is no bar to an indictment for the greater, must be regarded as unsound in principle ; while the doctrine which holds it to be a bar rests firmly on adjudication also.”

In the case of *The King v. Vandercomb*, 2 Leach C. C. 708, cited in 1 Leading Criminal Cases, 516, the court lays down the true principle, and its application, as follows :

“ These cases establish the principle, that unless the first indictment were such as the prisoners might have been convicted upon it, by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. A former acquittal is no bar to a subsequent prosecution unless the accused could have been convicted upon the first indictment, upon proof of the

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facts averred in the second. Now, to apply the principle of these cases to the present case: The first indictment was for burglariously breaking and entering the house of the Misses Neville's, and stealing the goods mentioned; but it appeared that the prisoner broke and entered the house with intent to steal, for in fact no larceny was committed, and therefore they could not be convicted on that indictment; but they have not been tried for burglariously breaking and entering the Misses Neville's house with intent to steal, which is the charge in the present indictment, and therefore their lives have never been in jeopardy for this offence. For this reason the judges are all of opinion that the plea is bad."

It is plain in this case, that the facts charged in the second indictment could not have convicted the accused on the first indictment, because proof of the intent to commit the larceny was not proof of the larceny itself; and it is also plain that, if the accused had been first convicted on the indictment for burglary with the intent to commit the larceny, and afterwards had been indicted for the burglary with the commission of the larceny, the conviction on the first indictment would have been a bar to the second, because larceny can not be committed without the intent to commit it; the proof, therefore, which would have convicted under the second indictment would necessarily have convicted under the first. So, in the case before us, the proof which would convict under the indictment for an assault and battery with intent to murder would necessarily convict of the assault and battery set up in the answer; the answer is, therefore, under the principle well settled, sufficient to bar the indictment. In the case of *The State v. Shepard*, 7 Conn. 54, it was directly held that a conviction on an indictment for an assault with intent to commit a rape was a bar to an indictment for committing the rape, the court saying, that: "If the convic-

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tion there can not be pleaded in bar of an indictment for a rape, then he may be tried again; and, as he has already suffered, and is still enduring a punishment for the less crime, and may be condemned and suffer for the greater, he may be twice punished for the same fact,—a doctrine repugnant to well established principles of law.”

In the case of *The State v. Chaffin*, 2 Swan, 493, it was held that a party, having been convicted of an assault, can not afterward be punished for a battery committed at the same time. The opinion of the court is brief, and in these words:

“The battery includes the assault, and for the assault the defendant has received the legal punishment. He can not now be punished for the battery, because it can not be separated from the assault. The one is a necessary part of the other, and if he be now punished for the battery he will thereby be twice punished for the assault; that is, be twice punished for the same offence, which, of course, can not be done.”

In the case of *Hickey v. The State*, 23 Ind. 21, it was held by this court, that a prosecution for larceny would bar a prosecution for robbery in taking the same goods, because the robbery included the larceny. In the case of *Hamilton v. The State*, 36 Ind. 280, it was held that a prosecution for an assault and battery with the intent to commit a robbery would bar a prosecution for the robbery itself. The case of *Jackson v. The State*, 14 Ind. 327, was as follows: “The indictment charged the defendant with stealing two horses. It appears in evidence that he stole, with the horses, saddles and bridles. It was claimed that there was a fatal variance. This was a mistake. The proof established the stealing of the articles charged in the indictment. This sustained the prosecution. The omission to include in the indictment other articles, stolen at the same time, and forming a part of a single offence, was for the defendant’s benefit, if it had any bearing upon the case. It made

the offence charged appear less aggravated than it really was, while the conviction or acquittal on the indictment as drawn, would bar another prosecution for the same larceny. The State can not split up one crime and prosecute it in parts. A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime."

We think it is impossible to distinguish these cases, in principle, from the case we are now considering; and the following authorities, as it seems to me, fully support the whole scope of this dissenting opinion: *Bruce v. The State*, 9 Ind. 206; *Trittipo v. The State*, 13 Ind. 360; *Wininger v. The State*, 13 Ind. 540; *Clem v. The State*, 42 Ind. 420; *Brinkman v. The State*, 52 Ind. 76; *Wilkinson v. The State*, 59 Ind. 416; *The King v. Emden*, 9 East, 437; *Commonwealth v. Squire*, 1 Met. 258; *Commonwealth v. Kinney*, 2 Virginia Cases, 139; *The State v. Lewis*, 2 Hawks, 98; *Price v. The State*, 19 Ohio, 423; *The State v. Birmingham*, Busbee, 120; *The State v. Keogh*, 13 La. An. 243; *The State v. Cooper*, 1 Green, N. J. 361; *Roberts v. The State*, 14 Ga. 8; *The People v. Van Keuren*, 5 Parker C. C. 66; *The State v. Townsend*, 2 Harring. Del. 543; *The State v. Benham*, 7 Conn. 414; *Commonwealth v. Cunningham*, 13 Mass. 245; *Commonwealth v. Tenney*, 97 Mass. 50; *Holt v. The State*, 38 Ga. 187; *The State v. Reed*, 12 Md. 263; *Wilson v. The State*, 24 Conn. 57; *Hite v. The State*, 9 Yerg. 357; *Durham v. The People*, 4 Scam. 172; *The State v. Elder*, 65 Ind. 282.

If the rule laid down by the majority of the court in this case, as the law of the land, must prevail, I do not see why any person charged may not be convicted, upon separate indictments, if the evidence warrants it, first for an assault and battery, second, for an assault and battery with intent to commit a felony, and, third, for the felony, when, in fact, the offences are but the component parts of one offence, namely, the felony, and thus be punished

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three times for the same offence. I do not think the State can apportion one crime into several offences of different grades, and punish the offender for each portion by piecemeal. The State must choose her ground, and when once chosen, and the offence prosecuted to final judgment, she can not be allowed to change her ground, and turn the same state of facts into another grade of the same offence, the proof of which would sustain the former charge also. Such a doctrine would tend to a Draconian severity, unwarranted by the spirit of American institutions, and, as I think, in violation of the constitution of the State of Indiana, by which it is solemnly declared, that :

"SEC. 14. No person shall be put in jeopardy twice for the same offence. No person, in any criminal prosecution, shall be compelled to testify against himself.

"SEC. 15. No person arrested, or confined in jail, shall be treated with unnecessary rigor.

"SEC. 16. Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offence.

"SEC. 17. Offences, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong.

"SEC. 18. The penal code shall be founded on the principles of reformation, and not of vindictive justice." Article 1, Constitution of Indiana, 1 R. S. 1876, p. 23.

After thus viewing the question by every light in which I can see it, and with the strongest desire to concur with my brother judges, I am yet unable to escape the judicial conviction, that the answer we are considering is sufficient, and that the judgment below ought to be affirmed. *Hayworth v. The State*, 14 Ind. 590; *Hamilton v. The State*, 36 Ind. 280; *McCarty v. The State*, 44 Ind. 214.

ULRICH v. MCCORMICK ET AL.

PRINCIPAL AND AGENT.—*Payment of Promissory Note to Servant of Agent, after Revocation of Agency.—Notice.—Instruction.*—In an action by the payee, against the maker, on a promissory note, wherein payment was pleaded, the evidence established that the note had been executed by the defendant for the price of a chattel sold and delivered to him by an agent appointed by the plaintiff to sell such chattels and collect such notes; that such agency was subsequently revoked, and a new agent appointed, but the defendant had no notice thereof; that subsequently the defendant called at a place where the former agent carried on his individual business, to pay off the note; and that, such agent being absent, his servant searched for the note, failed to find it, and, having gone and seen his employer, by direction of the latter received, and receipted to the defendant for, the amount of the note, in the name of his employer.

Held, that an instruction that such payment was invalid was erroneous.

Held, also, that such payment, if made in good faith and without notice of the revocation of such agency, was valid.

From the Huntington Circuit Court.

L. P. Milligan and A. Moore, for appellant.

F. Heiner, G. H. Chapman and U. J. Hammond, for appellees.

PERKINS, J.—Suit by the appellees, against the appellant, upon a promissory note, of which the following is a copy:

“\$200. CHICAGO, ILL., Sept. 17th, 1873.

“On or before the 1st day of January, 1874, for value received, the undersigned promises to pay C. H. McCormick & Bro., or order, at their office in the City of Chicago, Illinois, two hundred dollars, with — per cent. per annum, from July 1st, year as above, without relief from valuation or appraisal laws. It is also stipulated, that, should the collection of this note be enforced by law, a reasonable amount shall be allowed the holder as attorney's fees. Without interest if paid when due.

“JOHN H. ULRICH.

“Post-office: Huntington, Huntington Co., Ind.”

Answer, payment; reply in denial; trial by jury; ver-

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136	280

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dict for plaintiff, and judgment, over a motion for a new trial, on the verdict.

The reasons therefor, stated in the motion for a new trial, were :

1. Verdict contrary to law ;
2. Verdict contrary to evidence ;
3. Verdict not sustained by evidence ; and,
4. Error in the instructions given to the jury.

In the assignment of errors, three are specified, viz. :

1. The court erred in overruling the motion for a new trial ;
2. The court erred in its instructions to the jury ;
3. The court erred in not giving the jury further instructions applicable to the evidence in said cause.

Further instructions, it may be observed, were not asked by counsel.

A bill of exceptions contains the evidence.

The issue in the cause, as we have seen, was upon the payment of the note.

All the questions presented on this appeal fairly arise upon the first assignment of error, viz., that of overruling the motion for a new trial.

There is no conflict in the evidence. The note in suit, as appears upon its face, was executed September 17th, 1873, and was payable on or before the 1st day of January, 1874, at the office of the payees, in Chicago, Illinois. The note was executed in Huntington county, Indiana, and delivered to William R. Jones, then the agent, in said county, of McCormick & Bro., the appellees, who resided at Chicago, Ill., for the sale, in said county of Huntington, of the said McCormicks' Reaper, and the collection of the notes that might be given on such sales, which notes he retained, as such agent, in said Huntington county. Such is the fair inference from the evidence in the cause.

The note in suit was given for the price of a reaper purchased by said Ulrich of said agent, Jones.

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On the 10th of November, 1873, McCormick & Bro. revoked the appointment of agency then held by said Jones, took from him all notes and papers connected with the agency, and placed them in the hands of Buchanan & Co., of Huntington, in said county of Huntington, who were then appointed agents in place of said Jones, and were directed to give notice to the makers of said notes accordingly, but they failed to give notice to Ulrich, the appellant, till the 10th day of February, 1875. On the 31st day of December, 1873, Ulrich called at the store of said William R. Jones, and asked for the note in suit, saying that he wished to pay it. Said Jones was not in the store; was said to be at his house sick; but his son Willis was in the store. He was his father's clerk in the store. He looked for the note, but could not find it. Says Ulrich, in his testimony: "Willis told me the note was not there, when I asked him for it. He said he would receipt me the money I paid him, and it would be all right. I told him to destroy the note or hand it to me. After he said his father was too sick to get it for me, I paid him the money to stop interest."

The following is the receipt:

"HUNTINGTON, IND., Dec. 31st, 1873.

"Received of John H. Ulrich, on note given to W. R. Jones for the McCormick Reaper, two hundred dollars, due Jan. 1st, 1874.

WM. R. JONES,

"\$200.

WILLIS."

Willis testified that he went out to see his father about the matter, and acted therein pursuant to his directions.

The court instructed the jury thus:

"Whenever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal, or if he exceeds the authority delegated to him, he will be personally responsible therefor, to the person with whom he is dealing, for or on account of his princi-

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pal. When Ulrich dealt with Jones as the agent of plaintiffs, he did so at his peril; and if it turned out that Jones was then no longer the agent of plaintiffs, then Ulrich has no remedy against plaintiffs, and payment to Jones was not payment to McCormicks, in fact or in law." Which were all the instructions given in the cause, on the subject of agency, and to the giving of which defendant at the time then and there excepted.

The above instruction was erroneous. It went upon the theory that payment to an agent was void, after his agency had been revoked, in the absence of notice of the revocation.

In Wharton on Agency and Agents, it is said that "The revocation of an agency becomes operative as to the agent from the time it is actually made known to him;" but "Third parties dealing *bona fide* with one who has been accredited to them as an agent, are not affected by the revocation of his agency unless notified of such revocation." Chap. 2, sec. 110.

In *Diversy v. Kellogg*, 44 Ill. 114, it is decided, that,—

"Where a party is shown to have been the agent of another in a particular business, and continues to so act within the scope of his former authority, it will be presumed that his former authority still continues, and will bind his principal unless the persons with whom he acts have notice that his agency has ceased."

In this case the agency of Jones extended to the receiving payment of the note. The maker had not received notice of its revocation, nor of the withdrawal of the note from his custody. The above rule of law is founded in reason, common sense and justice.

The rule is involved in the case at bar; for, if the appellee paid the note in question to Jones, in good faith and without notice of the cessation of his authority as agent, the payment was a satisfaction of the note. But

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the question still remains, was the payment *bona fide*? or were the circumstances under which the payment was made such as to indicate the contrary,—to put Ulrich on his guard? Ulrich seems to have paid the note, supposing Jones still had it in his possession, but was too sick to look for and get it for him. These will be questions for the jury on another trial. See *Rathbone v. Sanders*, 9 Ind. 217, and *The Howe Machine Co. v. Simler*, 59 Ind. 307.

As to Ulrich, Jones was, so far as appears, still the agent to receive payment of the note, and still had it in his possession. Willis, the clerk, did not inform Ulrich that the note was not in possession of William R. Jones, but that it was not in the store. Willis appears to have been a clerk in the store, not in the business of the McCormick agency. He did not receive payment of the note as agent, but simply as a servant of his father, ministerially. Suppose his father had been at the store, and before Ulrich came in to pay the note, Jones, as we have said, still having it in his possession as to Ulrich, had said to Willis: "Receive that money for me, and receipt him for it in my name, I am busy just now, and will soon send the note to Ulrich;" would this be creating Willis a sub-agent? Let this point be all the time borne in mind: Jones was, as to Ulrich, still the agent to collect the note. Ulrich had the legal right to pay the note to him, and such payments made in good faith would extinguish the note.

The judgment is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

Petition for a rehearing overruled.

ROOT ET AL. v. HIBBEN ET AL.

PLEADING.—*Partial Answer to whole Complaint.*—*Promissory Note.*—*Common Count.*—*Partnership.*—*Harmless Ruling on Demurrer.*—In an action by

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the payee, against a copartnership alleged to be composed of A. and others, as maker and debtor, on two promissory notes and an account, in separate paragraphs, A.'s codefendants separately and jointly answered under oath to the whole complaint, alleging that such copartnership was composed solely of A. and a certain incorporated company, and that they, such codefendants, were not liable on the "note."

Held, on demurrer, that the answer, being pleaded to the whole complaint, though answering only part thereof, is insufficient.

Held, also, a verified general denial being in, that the facts alleged in the special answer were admissible in evidence under the general denial, and, therefore, that the sustaining of the demurrer was harmless.

From the Marion Superior Court.

D. Turpie and *H. D. Pierce*, for appellants.

J. E. McDonald, J. M. Buller, F. B. McDonald and *G. C. Butler*, for appellees.

BIDDLE, J.—The complaint in this case avers that James P. Hibben, Franklin Landers, Robert F. Kennedy, Augustus E. Pattison, Willis S. Webb, and Coleman B. Pattison were partners doing business under the firm name and style of "Hibben, Kennedy & Co.;" that Deloss Root, William R. Nofsinger, James H. McKernan, William H. A. Dell, Paul D. Pratt and George H. Wilmer were partners doing business under the firm name and style of "George Wilmer & Co.;" that the latter firm executed two certain promissory notes, of different dates and amounts, to the former firm.

These two notes are declared upon separately in the first and second paragraphs of the complaint. There is a third paragraph in the complaint, in the usual form of a common count "for goods, wares and merchandise sold and delivered by plaintiffs to defendants, at their special instance and request," with a bill of particulars.

McKernan and Root jointly answered the complaint in three paragraphs which are sworn to. William H. A. Dell answered the complaint separately, in four paragraphs, sworn to. William R. Nofsinger answered the complaint separately, in three paragraphs, sworn to.

A demurrer, alleging as cause the insufficiency of the facts to constitute a defence, was sustained to the third paragraph of McKernan and Root's answer, and to the third paragraph of Dell's answer, and also to the third paragraph of Nofsinger's answer, and exceptions reserved to all the rulings.

Other answers were filed, which we need not state, as no question arises upon them. A jury trial was had, resulting in a verdict for the appellees.

A motion for a new trial was made, overruled, and exceptions taken, but no question is presented under this motion. Neither the instructions to the jury nor the evidence on the trial are in the record.

Judgment on the verdict; appeal to the court in general term; judgment therein affirmed; appeal to this court.

There seems to be some confusion in the record. We do not find it to be as either the appellants or appellees seem to understand it. The counsel for appellants, in their brief, state: "It will be noted that the case was originally commenced by complaint in two paragraphs, on the notes. These paragraphs had been answered, and, after they were answered, the third paragraph—the common count—was filed."

The record, as it is made up and comes to us, shows that the three paragraphs of complaint were filed at the same time, on the 31st day of December, 1878, before any of the answers were filed. The counsel for appellees treat the several third paragraphs of answer, stated as above, as filed to the third paragraph of complaint.

We can find nothing in the record showing that to be the case. Neither of the paragraphs of McKernan and Root's joint answer, nor of the separate answers of Dell and Nofsinger, is restricted to either one of the paragraphs, or any particular part of the complaint, but each one pur-

Root et al. v. Hibben et al.

ports to answer the whole complaint. The counsel for appellants state in their brief that the original papers in the case were lost, and that the present record was substituted by the agreement of the parties. The apparent misunderstanding of the record by the counsel for appellants, and also by the counsel for the appellee, may have arisen from these circumstances. But we can treat the record only as it comes before us.

The sole question presented by the parties in their arguments arises upon overruling the demurrer to the several third paragraphs of answer, pleaded by the several parties as above stated, which are the same, we believe, literally, except that in the joint answer the nouns and pronouns are used in the plural number, and in the separate answers in the singular number, and are in the following words (we copy the third paragraph of the joint answer of McKernan and Root):

“And further answering they say, that on the 2d day of January, 1873, the Illinois Furnace Company, a corporation organized and subsisting under and by virtue of the statutes of Indiana, by its president, entered into a copartnership with one George Wilmer, by the style of George Wilmer & Co., for the purpose of carrying on a store for the sale of general merchandise at the grounds of the said Illinois Furnace Company, in the County of Hardin, State of Illinois, and for that purpose executed with said Wilmer articles of copartnership of that date, a copy of which is filed herewith as a part hereof, and marked ‘Exhibit A;’ that, by the terms of said article, said Illinois Furnace Company, as such corporation, became and was a partner, as one party, with said Wilmer, and continued as such until the ——— day of ———, ———, when such copartnership was dissolved; that the note sued on was executed, if at all, by the said George Wilmer & Company, as such firm, and

the constituent members thereof above, viz., the said Illinois Furnace Company and George Wilmer, are responsible therefor, and not these defendants. Wherefore they say that they are improperly sued and ask to be discharged with their costs."

It will be seen upon the face of this paragraph of answer that it was pleaded to the whole complaint. If it can be held good as to any part of the complaint—a question which we do not decide—it certainly can not be held good to the whole complaint. It does not deny nor refer to the third paragraph of complaint, and does not confess and avoid any part of the complaint. It is an answer—if sufficient as an answer at all—to only one of the two notes sued on, and they are shown to be different notes in the first and second paragraphs of the complaint, but does not state which, and not an answer at all to the third paragraph of the complaint. Besides, it is at best but an argumentative denial. Several paragraphs of general denial were pleaded by the same parties, some sworn to and others not, under which all the evidence could have been given which could have been under this third paragraph. The error, therefore, in sustaining a demurrer to the third paragraphs of answers, if error it was, after trial, became harmless.

We do not cite authorities to show that an answer pleaded to the whole complaint must be good to the whole complaint, or it will not be good to any part, nor to show that a demurrer sustained to a sufficient answer, in a case where another answer will admit the same evidence under it, becomes a harmless error after trial. These principles of pleading are too firmly settled and too familiar to require authorities to support them.

As the record comes to us, the judgment must be affirmed, at the costs of the appellants.

Petition for a rehearing overruled.

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66	252
167	433

TURNER v. ALLEN.

COVENANT.—*Breach of Warranty as a Defence to a Foreclosure.—Res Adjudicata.—Evidence.—Former Adjudication.*—In an action for the collection of a promissory note, and for the foreclosure of a mortgage given to secure payment thereof, wherein the defendant answered that the note and mortgage were given solely for the purchase-money for the mortgaged premises, which had been conveyed by the plaintiff to the defendant by warranty deed, and that there had been a breach of the covenants of such deed by reason of the fact that the defendant had been kept out of possession by a tenant holding under the plaintiff, and had expended money in ejecting the tenant, the plaintiff replied that the matters alleged in the answer had been adjudicated upon in a former action by the mortgagor, against the mortgagee, on the covenants of warranty, for breach thereof. The plaintiff, on the trial, offered in evidence a transcript of the pleadings, proceedings and judgment in an action by the mortgagor, against the mortgagee, for a breach of the covenants of such deed.

Held, that the evidence offered was competent.

Held, also, that the breach alleged in the answer was fairly presented by the issues made in the former action, and therefore must be deemed to be "at rest forever."

From the Hamilton Circuit Court.

W. Garver and R. Graham, for appellant.

W. Neal, J. W. Evans and R. R. Stephenson, for appellee.

Howk, J.—This was a suit by the appellee, against the appellant, upon a mortgage and note executed by the appellant to the appellee, for the collection of the note and the foreclosure of the mortgage. To the appellee's complaint, the appellant answered in two paragraphs, in substance, as follows.

1. A general denial; and,
2. That the note and mortgage in suit were executed by the appellant to the appellee, in consideration and to secure the payment of the purchase-money of the real estate described in said mortgage, for which the appellee executed to the appellant a warranty deed, a copy of which was filed with and made a part of said paragraph of answer: that there was a breach of said warranty, in this, that be-

fore and at the time of the execution and delivery of said deed, the appellee had rented and leased said property to one Albert R. Tucker, who then and there had and took possession of the same by virtue of said lease, and then and there kept the possession thereof for the term of one year, which was worth the sum of two hundred dollars and a damage to the appellant of that amount; that, in order to remove said Tucker from said premises, the appellant was compelled to institute suits against him for the possession thereof, which cost the appellant three hundred dollars; and his time and trouble, in attending to said suits, were worth two hundred dollars. Wherefore the appellant said, that he had been damaged, by reason of said breach of said warranty, in the sum of eight hundred dollars, which he demanded might be deducted from any amount that might be found due on said note and mortgage; and that, if an overplus should be found due the appellant, he should have judgment therefor.

To this second paragraph of answer, the appellee replied in two paragraphs, in substance, as follows.

1. A general denial; and,
2. That all of the matters set up in the said second paragraph of the appellant's answer had been theretofore fully adjudicated in the Hamilton Circuit Court, in a former trial between the parties to this suit.

The issues thus joined were tried by the court, and a finding was made and judgment rendered in favor of the appellee, and against the appellant, for the full amount due on the note and for the foreclosure of the mortgage, in due form of law. The appellant's motion for a new trial having been overruled, and his exception entered to this decision, he appealed from the judgment rendered to this court.

The only error properly assigned by the appellant in this court is the decision of the court below, in overruling

Turner v. Allen.

his motion for a new trial. In this motion, the following causes were assigned by the appellant for such new trial :

1. Error of the court in overruling the appellant's objection to the admission in evidence of the record and judgment in an action in the Hamilton Circuit Court, wherein the appellant was plaintiff and the appellee was defendant ;
2. Because the damages were excessive ;
3. Because the finding was contrary to law ; and,
4. Because the finding was not sustained by sufficient evidence.

In their argument of this cause, in this court, the appellant's counsel have complained only of the alleged error of the court below, in overruling the appellant's objection to the admission in evidence of the record and judgment mentioned in the first cause assigned for a new trial. It is admitted by the appellant, and it clearly appears from the record and judgment offered in evidence, that his cause of action, as set out in said record, and his cause of defence, as stated in the second paragraph of his answer in this case, were alike founded upon the same breach of the same warranty in the same deed. As we have seen, the second paragraph of the appellee's reply set up and relied upon the former adjudication of the defence stated in the second paragraph of the appellant's answer. The record of this former adjudication was, therefore, pertinent to the issues joined, and, we think, clearly admissible in evidence. The appellant's objection to the admission of this record in evidence, as stated in the bill of exceptions in this case, was, " that the defence set up to this action is simply a recoupment of damages on account of the defendant being left out of the enjoyment of the property set out in said deed, and the matter litigated in the former trial was for a breach of the warranty contained in the deed and a failure of title." This objection, as it seems to us, states a dis-

The Town of Westerville v. Freeman *et ux.*

inction where there is no material difference. The defence in this action, and the cause of action in the former action, both sought the recovery of damages, for the same breach of the same covenant of warranty. It is clear, therefore, that all the matters which fairly arise under the second paragraph of the appellant's answer, in this case, might have been litigated, tried and determined in the former action between the same parties. In such a case, the law is well settled, that all those matters must be considered as "at rest forever." *Fischli v. Fischli*, 1 Blackf. 360; *Crosby v. Jeroloman*, 37 Ind. 264; *Bates v. Spooner*, 45 Ind. 489; and *Richardson v. Jones*, 58 Ind. 240.

In our opinion, the court committed no error in overruling the appellant's motion for a new trial.

The judgment is affirmed, at the appellant's costs.

THE TOWN OF WESTERVILLE V. FREEMAN ET UX.

66	255
170	216

DAMAGES.—Verdict.—Tort.—Excessive Damages.—Rule in Supreme Court.—

The Supreme Court will not disturb the verdict of a jury assessing damages for a tort, on the ground of "excessive damages," unless the amount assessed appears, "at first blush, to be outrageous and excessive," or where some improper element entered into the consideration of the jury, in assessing the damages.

INTERROGATORIES.—Uncertainty in Answers.—It was held in this case that the court did not err in refusing to require the jury to make more definite their answers to certain interrogatories.

From the St. Joseph Circuit Court.

W. H. Calkins and *L. A. Cole*, for appellant.

D. Noyes, *M. H. Weir* and *W. B. Biddle*, for appellees.

PERKINS, J.—Suit by Mrs. Sarah J. Freeman, with whom her husband, Blackstone Freeman, joined, to recover dam-

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ages by Mrs. Freeman for injuries she received from falling into an excavation made in one of the streets of said town. Damages claimed, ten thousand dollars.

Issue; trial by jury; verdict for the plaintiffs for four thousand dollars; new trial granted. The second trial resulted in a verdict for the plaintiffs for two thousand dollars.

Motion for a new trial overruled, and judgment on the verdict.

The error properly assigned in this court is the overruling of the motion for a new trial.

The reasons for the new trial stated in the motion were:

1. Verdict contrary to law;
2. Verdict contrary to the evidence;
3. Excessive damages; and,
4. Errors of law occurring at the trial,—

(1.) In refusing to require the jury to answer certain interrogatories more definitely;

(2.) In giving and refusing instructions; and,

(3.) In admitting and refusing to admit testimony, etc.

The verdict was not contrary to law, *Anderson v. Donnell*, ante, p. 150; and was sustained by the evidence.

This court can not say the damages given were excessive. The action is one of tort for an injury to the person. The "hip bone" of the injured party was broken, and she was rendered a cripple for life. There are no data for the mathematical calculation of the exact compensation for such an injury, except as to loss of time, expenses incurred, etc. The law leaves the amount of such compensation for the pain and suffering, etc., to the sound discretion of the jury; and the general rule governing the appellate court in this class of cases is, that it will not reverse the judgment of the court below in refusing a

new trial asked for on the ground of excessive damages, "unless they appear, at first blush, to be outrageous and excessive," or that some improper element, in determining the amount, was taken into account by the jury. *Picquet v. McKay*, 2 Blackf. 465; *Yater v. Mullen*, 23 Ind. 562; *Kepler v. Hyer*, 48 Ind. 499; *The City of Indianapolis v. Gaston*, 58 Ind. 224.

We can not say they so appear in this case.

No objections to the instructions given, and no reason why those refused should have been given, are so presented on behalf of appellant as to require notice; and the counsel for appellant decline to argue the questions as to the admissibility and non-admissibility of the items of evidence mentioned in the motion for a new trial. Counsel, in the short brief filed, promised an additional one, but have not furnished it.

We think the court did not err in failing to require more definite answers to interrogatories from the jury. See *Manning v. Gasharie*, 27 Ind. 399; *Chapin v. Clapp*, 29 Ind. 614; *McElfresh v. Guard*, 32 Ind. 408; *Hopkins v. Stanley*, 43 Ind. 553; *House v. McKinney*, 54 Ind. 240; *Peters v. Lane*, 55 Ind. 391; *Campbell v. Peterman*, 56 Ind. 428; *Alexander v. The North-Western, etc., University*, 57 Ind. 466; *Killian v. Eigenmann*, 57 Ind. 480; *Mason v. Moulden*, 58 Ind. 1; *Miller v. Wade*, 58 Ind. 91; *Smith v. Zent*, 59 Ind. 362; *Murray v. Phillips*, 59 Ind. 56; *Reed v. Garr*, 59 Ind. 299; *Bowles v. Stout*, 60 Ind. 267; *Ogle v. Dill*, 61 Ind. 438; *Kealing v. Voss*, 61 Ind. 466; *The Toledo, etc., R. W. Co. v. Craft*, 62 Ind. 395; *The Indianapolis, etc., R. R. Co. v. McCaffrey*, 62 Ind. 552.

The judgment below is affirmed, with costs.

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GOODRICH, ADMINISTRATOR, v. JOHNSON, BY HER NEXT FRIENDS.

66 258
139 405
66 258
141 166

CONTRACT.—*When Presumed to be verbal.*—*Pleading.*—Where the contrary is not alleged in the complaint in an action on a contract, it is conclusively presumed that the contract was merely verbal.

SAME.—*Agreement to Maintain Bastard.*—*Statute of Frauds.*—*Contract for Benefit of Another.*—A bastard child, by her next friend, sued the estate of the deceased putative father, for a breach of an alleged verbal contract by the latter to support the plaintiff until majority, made between the mother and putative father as the basis of an acknowledgment of record, in the circuit court, by the mother, that provision had been made to her satisfaction for the support of the child, and as the sole consideration of the dismissal of a prosecution for bastardy, instituted by the mother against the decedent.

Held, on demurrer, that the agreement was one that could not be performed within one year, and, therefore, that it was void under clause 5, section 1, of the statute of frauds, 1 R. S. 1876, p. 503.

From the Madison Circuit Court.

C. L. Henry and H. D. Thompson, for appellant.

W. R. Pierce, for appellee.

- **Howk, J.**—In this action, the appellee, “a minor, of the tender age of two years,” by her next friends, sued the appellant, as the administrator of the estate of Tensley Davis, deceased, in a complaint of a single paragraph, and alleged therein, in substance, that in the year 1872 the said Tensley Davis begot a bastard child by Alice J. Johnson; that in 1872 the said Alice J. Johnson, the mother of said bastard child, commenced a suit in bastardy against said Tensley Davis, before a justice of the peace of Madison county, Indiana, charging under her oath, under the law in cases of bastardy, that the said Tensley Davis was the father of said bastard child; that, on the trial of said suit, the said Tensley Davis was adjudged by the justice to be the father of said bastard child; that, under the law, the justice then and there certified said cause to the Madison Circuit Court, and that the cause was on the docket of said court for trial at its December term, 1873; that while

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said cause was so pending in said court, at said term, for trial, (the said bastard child having been born on the 6th day of February, 1873, and named by her mother Minnie M. Johnson, she being the plaintiff in this suit,) the said Tensley Davis, then in life but since deceased, (and of whose estate the appellant is now administrator,) and the said Alice J. Johnson, the mother of said bastard child, as they lawfully might, compromised said bastardy suit; that, by said compromise, the said Tensley Davis promised and agreed to take into his care and keeping the said Minnie M. Johnson, the said bastard child, and maintain, support, educate, keep, board and clothe her in a proper, good, prudent and careful manner, as all other children in ordinary and creditable circumstances in life were kept, during and until she was twenty-one years of age, and during all said time to keep, take care of, educate and support her in a prudent and proper manner, and in consideration also that the said Alice J. Johnson would enter of record, in said court, that provision had been made, to her satisfaction, for the maintenance of said child, and have said suit dismissed at the costs of said Tensley Davis; that, in pursuance of said agreement, and in consideration thereof, the said Alice J. Johnson did, at said term of said court, enter of record her agreement, that provision for the maintenance of said bastard child had been made to her satisfaction, and did, at said term, dismiss said suit in bastardy, at the costs of said Tensley Davis; that, shortly after the said agreement was made, the said Tensley Davis died, in the spring of 1873, and the appellant had been appointed, by the proper court, administrator of said decedent's estate; that the said Tensley Davis had failed and refused, and since his death his said administrator had failed and refused, to perform all or any part of the said agreement, either to take in charge, support, care for, keep, maintain or educate, or in any way to provide for the said Minnie

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M. Johnson, the said bastard child; and the appellee averred, that to take charge of and properly provide for her, protect, maintain and keep her, under said agreement, until she became twenty-one years of age, would be worth at least one thousand dollars, which sum was due and unpaid, and for which sum the appellant demanded judgment.

This complaint was verified by the oath of Alice J. Johnson, the appellee's mother and next friend. The appellant's demurrer to the complaint, for the alleged insufficiency of the facts therein to constitute a cause of action, was overruled by the court, and to this ruling the appellant excepted.

The appellant answered in four paragraphs; of which the first was a general denial, and each of the other three paragraphs stated affirmative matters, by way of defence. The appellee's demurrer to each of the affirmative paragraphs of answer, for the alleged want of sufficient facts therein, were severally sustained by the court, and to these rulings the appellant excepted.

The issues joined were tried by a jury, and a verdict was returned for the appellee, assessing her damages in the sum of nine hundred dollars; and the appellant's motions for a new trial and in arrest of judgment having been overruled, and his exceptions entered to these rulings, judgment was rendered on the verdict.

The first error assigned by the appellant, in this court, is the decision of the circuit court in overruling his demurrer to the appellee's complaint. This alleged error presents, for our consideration and decision, what we regard as the controlling and decisive question in this case, and that is, the validity in law of the agreement counted upon by the appellee, as the foundation of her cause of action. Of course, if this agreement was invalid and void, as between the contracting parties, it can not be enforced by either of

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the parties thereto, nor by the person beneficially interested therein. The agreement in suit was an oral or parol agreement. It was not alleged to be in writing, and therefore it is conclusively presumed, for the purposes of this case, to have been a verbal or parol agreement, and not in writing. *Berkshire v. Young*, 45 Ind. 461; *Krutz v. Stewart*, 54 Ind. 178; and *Langford v. Freeman*, 60 Ind. 46.

In section 1 of "An act for the prevention of frauds and perjuries," etc., approved June 9th, 1852, it is provided, "That no action shall be brought in any of the following cases: * * * *

"*Fifth*. Upon any agreement that is not to be performed within one year from the making thereof, unless the promise, contract or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized; excepting, however, leases not exceeding the term of three years." 1 R. S. 1876, p 503.

The agreement or promise of the appellant's decedent, upon which the appellee sued in this action, by its express terms, was not to be, and could not be, performed within one year from the making thereof. It was a continuing promise, extending through the period of twenty-one years from the making thereof, and was not to be fully performed until after the lapse of all those years. However binding in ethics or good conscience, the decedent's agreement or promise, as stated in appellee's complaint, was, or may be supposed to have been, we are clearly of the opinion, that, under the provisions above quoted from the 1st section of the statute of frauds, no action can be brought and maintained upon such an agreement or promise, either by the appellee or by her mother, the said Alice J. Johnson.

This question was fairly presented for decision by the appellant's demurrer to the appellee's complaint, for the want

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of sufficient facts therein to constitute a cause of action. *Fall v. Hazelrigg*, 45 Ind. 576.

Assuming, as we must assume, under the allegations of the appellee's complaint, that neither the promise or agreement of the appellant's decedent, upon which this action was brought, nor any memorandum or note thereof, was in writing, and signed by the decedent in his lifetime, or by any person thereunto by him lawfully authorized, it seems clear to us, that the complaint did not state facts sufficient to constitute a cause of action, and that the appellant's demurrer thereto for the want of sufficient facts ought to have been sustained.

Where, as in this case, the promise or agreement is such by its terms, as to show that it is not to be performed within a year, or where, as in this case, the promise or agreement is such by its terms, that it can not be performed in a year, in accordance with the expressed intent and understanding of the parties to such promise or agreement, in either case the law is, as we understand it, that the promise or agreement, resting wholly in parol, is within the statute of frauds, and can not be enforced by an action. The law on the subject now under consideration is thus stated in section 273 of Browne's treatise on the Statute of Frauds:

"That the statute does not mean to include an agreement which is simply not likely to be performed, and yet one which is not expected to be performed within the space of a year from the making; but that it means to include any agreement which, fairly and reasonably interpreted, does not admit of a valid execution within that time."

It is very clear, we think, that the promise or agreement of the appellant's decedent, as stated in the appellee's complaint, and covering, by its express terms, a period of twenty-one years, could not be performed within one year, and was therefore included within the statute. *Wilson v. Ray*, 13 Ind. 1; *Shipley v. Patton's Adm'r*, 21 Ind. 169; *The Indiana, etc., R. W. Co. v. Searce*, 23 Ind. 223.

The court erred, we think, in overruling the demurrer to the complaint.

Other errors have been assigned by the appellant, upon other rulings of the court; but, as the conclusion we have reached, in regard to the insufficiency of the appellee's cause of action, will lead to a reversal of the judgment, and perhaps to the formation of new issues, we need not now consider or decide the questions presented by those other errors.

The judgment is reversed, at the costs of the appellee's next friends, and the cause is remanded, with instructions to sustain the demurrer to the complaint, and for further proceedings in accordance with this opinion.

HIGBEE ET UX. v. MOORE.

56	263
143	367

SPECIFIC PERFORMANCE.—Verbal Contract.—Tender.—Answers to Interrogatories.—Instructions to Jury.—In an action by the vendee, against the vendor, his wife, and a subsequent purchaser from such vendor, to enforce specific performance of an alleged verbal contract for the sale and conveyance of certain real estate, the complaint alleged the making of the contract, partial payment of the purchase-money, delivery to the plaintiff of immediate possession, the making of valuable and lasting improvements, tender of a certain sum as the residue of the purchase-money with interest, demand and refusal of a conveyance, and subsequent conveyance by the vendor and his wife to their codefendant, who purchased with knowledge of the plaintiff's rights. The jury, with their general verdict for the plaintiff, found specially that there was due of the purchase-money, to the vendor, from the plaintiff, *at the date of the trial*, a certain sum of money exceeding the amount of the alleged tender.

Held, on appeal, in which the subsequent purchaser formally declined to join, that the special finding does not conflict with the general verdict, nor with the allegation of a tender.

Held, also, that the appellants can not complain of instructions to the jury affecting the interests of their codefendant only.

Higbee *et ux.* v. Moore.

SUPREME COURT.—*Presumption.*—*Instructions, when Evidence is not in Record.*—Where, on appeal to the Supreme Court, the evidence is not, and the instructions are, in the record, and, under the issues, evidence could have been given to which the instructions would be applicable, it is presumed that such evidence was given.

From the Hamilton Circuit Court.

T. J. Kane and *T. P. Davis*, for appellants.

A. F. Shirts, *G. Shirts* and *W. R. Fertig*, for appellee.

NIBLACK, J.—The action in this case was by Henry M. Moore, against Egbert Higbee, Anna E. Higbee, his wife, and Albert J. Flanagan, for the specific performance of an alleged contract for the sale of real estate.

The complaint charged that the plaintiff had, on the 13th day of May, 1870, purchased of the defendant Egbert Higbee, by a parol contract, the south half of a certain lot in the town of Millwood, for the sum of \$50.00, paying at the time \$23.00 and immediately taking possession under such contract and making valuable and lasting improvements on said half lot; that, long before the commencement of the suit, the plaintiff offered to pay said Higbee, and tendered to him, the sum of \$29.00, that being the balance of principal and interest then due under the contract, and demanded of said Higbee a deed for said real estate; and that the defendant Flanagan had received from the said Higbee and wife a deed for such real estate, with full knowledge of the plaintiff's possession of and equities in the same.

The defendants answered in general denial, and the cause went to a jury for trial.

The jury returned a general verdict for the plaintiff, and answers to special interrogatories as follows:

"1st. How much does the plaintiff *now* owe, of unpaid purchase-money, on said real estate?

"Ans. Thirty-five and 96-100 dollars.

"2d. Did the defendant Flanagan accept his deed for

said real estate with a knowledge of plaintiff's claim to said real estate, and with a knowledge of the plaintiff's possession of the same?

"Ans. He did."

The defendants moved for judgment in their favor, upon the answers to the special interrogatories, notwithstanding the general verdict, but their motion was overruled. A motion for a new trial was then interposed by the defendants, but that motion was also overruled.

The court thereupon decreed that the plaintiff was entitled to a conveyance of the real estate described in the complaint, upon payment into court of the balance of the purchase-money, found by the jury to be still due as above stated, and appointed a commissioner to execute such conveyance.

This commissioner afterward executed a deed of conveyance of such real estate to the plaintiff, which deed was approved and confirmed by the court.

Higbee and wife have appealed to this court, but Flanagan, the other defendant, has formally declined to join in the appeal. The evidence is not in the record.

The appellants insist, that, as the complaint averred that the appellee had tendered to Higbee, the vendor, but twenty-nine dollars, while the jury found that there was due to the said Higbee, at the time of the trial, the sum of thirty-five dollars and ninety-six cents, it was thus made to appear that the appellee had not tendered to the said Higbee a sum sufficient to entitle him to a deed for the real estate in suit, and that hence the court erred in refusing to render judgment in favor of the defendants below, upon the answers to the special interrogatories.

The jury were not required to answer specially as to any matter connected with the tender of money averred in the complaint, and hence answered nothing concerning such alleged tender. Because the jury answered, that, at

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the time of the trial, there was due to Higbee thirty-five dollars and ninety-six cents, no implication resulted, that we can see, that a tender of a sufficient sum of money might not have been made at some time before the commencement of the suit.

We think the court did not err in overruling the motion for judgment in favor of the defendants.

The appellants further insist that the court erred in certain instructions given by it upon the trial.

It has been settled by this court, in a long line of decisions, that if, under any reasonably supposable state of the evidence, the instructions given could have been correct, it will be presumed, the evidence not being in the record, that such a state of the evidence did exist. *The Aurora Fire Insurance Co. v. Johnson*, 46 Ind. 315; *Keating v. The State, ex rel.*, 44 Ind. 449; *The Columbus, etc., R. W. Co. v. Powell*, 40 Ind. 37; *Miller v. Voss*, 40 Ind. 307; *The State v. Frazer*, 28 Ind. 196; *List v. Kortepeter*, 26 Ind. 27; *The Jeffersonville R. R. Co. v. Swift*, 26 Ind. 459. There are other, previous cases to the same effect.

In the light of these authorities we can not say that the instructions complained of were, in every view of the case as it may have been presented, necessarily erroneous. We do not however set out or farther comment upon those instructions, as the appellants had, before the commencement of this suit, conveyed all their title to the real estate in controversy to their codefendant Flanagan, and are, hence, not now in a condition to ask a reversal of the judgment on account of erroneous instructions really affecting only Flanagan's title to such real estate.

Flanagan was the only one whose title was divested by the judgment appealed from, and, as he has declined to join in the appeal, we could not, at all events, reverse the judgment as to him.

We, therefore, see nothing in the record of which the

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appellants have reason, and as to which they are in a condition, to complain.

The judgment is affirmed, at the costs of the appellant Egbert Higbee.

HARRIS v. RICE, ADMINISTRATOR.

STATUTE OF LIMITATIONS.—*Extension of Limitation, on Death of Party, under Section 217.*—The limitation of six years, prescribed by section 210 of the code as the period within which actions on account must be brought, is not shortened by section 217 of the code, prescribing that, upon the death of either party to a contract not then barred, the action survives to or against the representative of the decedent, and must be brought within eighteen months after his decease.

SAME.—In case of the death of either party less than eighteen months preceding the expiration of the limitation fixed, the effect of section 217 of the code is such as to extend the statutory limitation for a period equal to the difference between eighteen months and the residue of the limitation unexpired at the death of such party.

From the Hendricks Circuit Court.

C. Foley, for appellant.

L. M. Campbell, for appellee.

Howk, J.—In this case the appellant filed his claim, duly verified, against the estate of Joshua Harris, deceased, in the clerk's office of the court below; which claim was duly entered on the appearance docket of said court.

Afterward, the claim, not having been admitted by the administrator of said estate, was duly transferred, for trial, to the issue docket of the court. The cause was put at issue and tried by the court; and, at the appellant's request, the court made a special finding of the facts in writing, and then stated its conclusions of law thereon, as follows :

Harris v. Rice, Administrator.

“James Harris, Claimant, v. William H. Rice, Adm'r *de bonis non* of the Estate of Joshua Harris, Deceased, Defendant.

“On the trial of the above entitled cause, the claimant requested the court to make a special finding of the facts in said cause, and the conclusion of law upon them, involved, notifying the court of his intention of excepting to such conclusion of law, and of appealing said cause to the Supreme Court of Indiana, which finding and conclusion are as follows :

“1st. The court finds, that the claimant rendered the defendant's decedent the services, as averred in the claim, from October, 1872, to March, 1873, when the decedent died, on a valid promise of the decedent to pay for the same what they should be worth, and that said services were worth two hundred and sixty-four dollars, which sum has never been paid.

“2d. That defendant's decedent died in March, 1873, and that in April, 1873, one Thomas W. Morgan was duly appointed by this court administrator of the estate of said decedent, and who continued in that capacity until November 12th, 1876, when he died ; that there was a vacancy in said trust, until March 27th, 1877, when the defendant was appointed administrator *de bonis non* of said estate ; and that the claimant had full notice of all thereof.

“3d. That the claim in this cause was filed November 11th, 1876.

“Upon which facts the court finds and decides the conclusion of law involved, as follows, to wit :

“1st. That the claimant is not entitled to maintain this cause, or recover any thing on said claim, because the same was not filed within eighteen months after the death of defendant's decedent.”

To the conclusion of law upon the facts found, the appellant at the time excepted ; and judgment was rendered

by the court, upon and in accordance with its conclusion of law, in favor of the appellee and against the appellant, for the costs of suit, from which judgment this appeal is now here prosecuted.

In this court, the only error assigned by the appellant is, that the court below erred in its conclusion of law upon the facts stated in its special finding.

We have no brief of this cause from the appellee or his counsel; but it can not be questioned, as it seems to us, that the court clearly erred in its conclusion of law upon the facts stated in its special finding. The appellant's suit was founded upon an open account for work done and services rendered by the appellant for the appellee's decedent, in his lifetime, "on a valid promise of the decedent to pay for the same what they should be worth." The work was done and the services were rendered between October, 1872, and March, 1873.

In section 210 of the practice act, it is provided, that actions "on accounts and contracts not in writing" shall be commenced within six years, and not afterward. 2 R. S. 1876, p. 121.

This suit was commenced, as the court found the fact to be, on the 11th day of November, 1876; and therefore it is clear, that no part of the account in suit in this case was barred by the limitation provided in said section 210 of the practice act.

We learn from the brief of the appellant's counsel, that the court's conclusion of law, in this case, was founded upon its construction of the provisions of section 217 of the practice act. This section reads as follows:

SEC. 217. If any person entitled to bring, or liable to any action, shall die before the expiration of the time limited for the action, the cause of action shall survive to or against his representatives, and may be brought at any time, after the expiration of the time limited, within

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eighteen months after the death of such person." 2 R. S. 1876, p. 127.

It would seem from the court's conclusion of law, upon the facts found in this case, that the court construed this section 217 as a limitation upon the time within which a cause of action might be sued upon, either by or against the personal representatives of a decedent, under the general provisions of the statute of limitations. Thus, in the case at bar, the appellant's account against the appellee's decedent was closed by the decedent's death, in March, 1873; and, as we have seen, under the general limitation provided in section 210 of the code, the appellant might have sued on his account, as he has done, at any time within six years. The court, however, in its conclusion of law, has evidently construed section 217 as limiting the time within which this action could be brought, to the period of eighteen months after the decedent's death. We do not think that this construction of the section can be sustained. It was not the legislative intention, in this section, as we construe its provisions, to abbreviate, in any instance, the period of time within which an action might be commenced, under the provisions of the statute of limitations. But it was the object and purpose of the section, we think, in all cases where death intervened within eighteen months of and preceding the close of the ordinary period of limitation, to allow suits to be brought either by or against the personal representatives of such decedent, within said period of eighteen months, upon causes of action which, without that section, would have been barred by limitation during that period, and before the suit was brought. Thus, it seems to us, that, under this section, while the ordinary period of limitation may possibly be enlarged, yet it can never be diminished or abbreviated in any case.

This construction of section 217 is in harmony with.

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and supported by, the opinion of this court in the case of *Hiatt v. Hough*, 11 Ind. 161, wherein it was said by PERKINS, J., in commenting upon the section in question: "By this exception, an action may be brought on a note, where either party to it has died, just as long after the expiration of twenty years as eighteen months from the death of such person would extend."

We are clearly of the opinion, that the court below erred, in this case, in its conclusion of law upon the facts stated in its special finding.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to the court below to render judgment upon its special findings, in favor of the appellant and against the estate of the appellee's decedent, for the sum of two hundred and sixty-four dollars and interest thereon since the 29th day of June, 1877, and costs of suit.

HADLEY v. THE STATE, EX REL. THE CITY OF RICHMOND.

96	271
154	321

COMMON SCHOOL FUNDS.—*Treasurer of City School Trustees.—Complaint against, for Interest.—Uncertainty.—Parties.—Relator.—Finding on Good Paragraphs.*—In an action by the State, "for the use of" a city "as a distinct municipal corporation for school purposes," against the treasurer of the school trustees of such city, to recover for interest alleged to have been received by the defendant on the funds in his hands, the first paragraph alleged that the defendant had been fully compensated for his services, by the city council, out of the special school fund, and that, during his term of office, he had "used, hired and loaned, and permitted others to use, hire and loan," the common and special school funds in his custody, and had thereby realized a certain sum for which he refused to account. The second paragraph sought to recover interest for his use of other school funds; and the third was for money had and received.

Held, on demurrer, there being no motion to make more certain, that the first and third paragraphs were sufficient.

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Held, also, the finding of the court having been on the first and third paragraphs, that the overruling of a demurrer to the second was harmless.

Held, also, on demurrer for defect of parties, that the action was properly brought in the name of the State, for the use of such city.

SAME.—Interest paid Trustee by County Treasurer.—Case Distinguished.—

Estoppel.—The court trying such cause found specially, that the interest received by the defendant was interest accrued upon warrants issued by the county auditor, in favor of the defendant, on the county treasurer, for the funds themselves, and paid by the latter out of those funds.

Held, that the defendant was liable, that he is estopped to deny the authority of the county treasurer to pay him such interest, and that the case does not fall within *Rock v. Stinger*, 36 Ind. 346.

SAME.—Amendment.—Harmless Ruling.—Where, after the sustaining of a demurrer to a pleading, other pleadings are filed, under which the evidence admissible under the former is properly given, the ruling on such demurrer is harmless.

From the Wayne Circuit Court.

W. A. Bickle and *C. H. Burchenal*, for appellant.

H. C. Fox, *J. Yaryan* and *J. L. Yaryan*, for appellee.

PERKINS, J.—A complaint, as follows, was duly filed in this cause :

“The State of Indiana, for the use of the City of Richmond in said county of Wayne, as a distinct municipal corporation for school purposes, and the plaintiff in this suit, complains of Jeremiah Hadley, defendant, and says that from the 1st day of April, 1873, to the commencement of this suit, the defendant acted as treasurer of the board of trustees of the common schools of the city of Richmond aforesaid; that, during the time he so acted, the said State, as the founder and donor of the common school fund, through her Legislature and municipal officers, placed in the hands of said defendant, for tuition purposes, large sums of her school fund, to wit, \$136,914; and that there was placed in his hands the further sum of \$68,268 taxes assessed and collected on and from the inhabitants and property of said city, for the construction of school-houses, to provide school furniture, school apparatus and pay the necessary expenses of running the schools of said city.

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And, as a full compensation for the care and disbursement of the moneys aforesaid, the common council of said city paid the defendant, and the defendant received, out of the special school fund so assessed and collected as aforesaid, from one to six hundred dollars annually. And while the defendant was in charge of said school funds, as the custodian thereof, he used, hired and loaned, and permitted others to use, hire and loan, said funds, and realized large sums of interest, gain and profit, for the use, hire and loan aforesaid, to wit, the sum of \$2,816.91, an itemized statement of which is filed herewith," etc.; that "said defendant has failed to account," etc., "and has converted said moneys to his own use, and judgment is demanded for \$2,500."

The complaint contained a second paragraph, seeking to recover for the use by the defendant of other school funds, derived from a different source; and a third paragraph for money had and received, etc., accompanied by a bill of particulars.

The complaint was demurred to for defect of parties, plaintiff and defendant, and for want of facts constituting a cause of action, but the demurrer was overruled and exceptions entered.

As to the suit being in the name of the State, see sec. 145, 1 R. S. 1876, p. 810.

The defendant answered:

1. That, as to all rents for certain property held by the city of Richmond by donation, he had fully accounted to the city council for the same;
2. That, as to said rents, the State had no right to sue for the same;
3. That, as to the interest, mentioned in the complaint, on said school funds, the school trustees decided that he was entitled to it;
4. That said interest on, and use of, the school funds,

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was allowed to him by the school trustees as part of his compensation for services ;

5. The statute of limitations of six years ;

6. The statute of limitations ;

7. Payment ; and,

8. The general denial.

Reply in denial to the first seven paragraphs of answer.

Trial by the court, and, at the request of the defendant, a special finding was made which was as follows :

“ Upon the request of the defendant, the court here states specially the facts found by the court to have been proved upon the trial of the issues in this cause :

“ *First.* That the defendant, Jeremiah Hadley, was elected by the common council of the city of Richmond, school trustee, in the year 1866, and was, by the school board of said city, elected treasurer of the board of trustees. That he gave a joint bond with the other trustees for that year. That he continued to hold said office, by re-election and appointment, from that time up to April, 1873, and that he gave his individual bond as such treasurer, with sureties, which were from time to time approved by the county auditor, from 1866 up to April, 1873, when his term of office expired.

“ *Second.* That during the time he was such treasurer, and at the dates hereinafter stated, he received from the treasurer of Wayne County, upon orders drawn by the Auditor of said County in his favor, the following sums of money, viz.:

Sept. 11th, 1868,.....	\$ 73.46
Jan. 14th, 1869,.....	4.51
Feb. 2d, 1870,.....	199.16
March 3d, 1870,.....	18.98
Dec. 22d, 1870,.....	14.00
Dec. 8th, 1870,.....	17.50
Apr. 25th, 1871,.....	2.98

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March 31st, 1871, ...	443.62
Dec. 21st, 1871,.....	19.79
March 28th, 1872,.....	511.70
Dec. 19th, 1872,.....	80.70
Apr. 3d, 1873,.....	446.88
Nov. 21st, 1871,.....	192.95

“ Making, in the aggregate, the sum of.....\$1,976.23

“ That said several sums of money, so received by him as above found, were for interest which had accrued upon orders which had been issued by the auditor of Wayne County, and delivered to the defendant as such treasurer, for school funds in the county treasury, belonging to said city of Richmond as a corporation for school purposes, during the years above named ; and which interest had accrued, to the amounts above stated, upon such orders, from the dates thereof respectively, or from the time of the presentation thereof to the county treasurer, by the said defendant, for payment, until the same were paid to the said defendant as such treasurer as aforesaid.

“ *Third.* And the court further finds that such defendant, as such treasurer, has never accounted to the county commissioners of said county, nor to the county auditor, nor to any other person or officer, for said several sums of money or any part thereof, but has converted the same to his own use.

“ *Fourth.* And the court further finds that said defendant, during his said several terms of office, as such treasurer, received as a compensation for his services, fixed by the common council of said city, for two years, the sum of \$400 per annum, and for two years following the sum of \$600 per annum ; and after that time, during his continuance in office, the sum of \$100 per annum.

“ *Fifth.* The court finds that the defendant has failed to prove the agreement alleged in the fourth paragraph of his

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answer, by a preponderance of the evidence, and upon that issue the court finds against the defendant.

"Sixth. The court further finds that the defendant has accounted for all sums of money, which have been shown by the evidence to have come into his hands as such treasurer, and charged against him in the complaint, except the said several sums above stated.

"And the court holds, as a conclusion of law upon the facts above found and stated, that the plaintiff is entitled to recover of the defendant the above sum of \$1,976.28.

J. H. MELLETT."

The defendant moved for judgment in his favor, on the special finding of facts, which motion was overruled. A motion then made for a new trial was denied. Exceptions were entered. Judgment was thereupon rendered against the defendant, upon the special finding. The defendant excepted and appealed to this court. Sixty days were given in which to file a bill of exceptions.

The evidence is not in the record.

The assignment of errors is as follows:

1. The court erred in overruling the defendant's motion to dismiss the cause for want of authority in the attorneys appearing on the part of the plaintiff to institute or prosecute the suit;
2. In requiring the defendant to answer before the attorneys appearing on the part of the plaintiff produced their authority to appear and prosecute said suit;
3. In overruling the several demurrer to the first, second and third paragraphs of the amended complaint;
4. In overruling the demurrer to the complaint;
5. In sustaining the several demurrer to the first, second, fourth, sixth, seventh and eighth paragraphs of answer;
6. In sustaining the demurrer to the amended third paragraph of answer;
7. In its conclusions of law upon the facts specially found;

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8. In overruling defendant's motion for judgment on the special finding of facts;

9. In rendering judgment for the plaintiff; and,

10. In overruling the motion for a new trial.

We proceed to consider the assignments of error.

We have not incorporated into this opinion the facts touching the action of the court on the motions of appellant to dismiss, and to require the attorneys of the appellee, the plaintiff below, to produce their authority to prosecute the suit. These were matters aside from the merits of the cause; the circuit court was satisfied, upon the showing made, of the authority of said attorneys, and, we think, properly so. 2 R. S. 1876, p. 306, and notes. The result demonstrated the justice of the suit.

We think the court did not err in overruling the several demurrer to the first and third paragraphs of the complaint. Their sufficiency as to certainty and particularity of statement was not tested by a motion to make more certain, etc.

The finding and judgment were upon those two paragraphs; hence the ruling on the second was harmless.

The complaint contained a cause of action.

It is earnestly insisted, that the suit was improperly brought in the name of the State.

We think section 145 of the act to provide for a general system of common schools authorizes the suit as brought. That section reads thus:

"Suits brought on behalf of the school of any township, town or city, shall be brought in the name of the State of Indiana, for the use of such township, town or city." 1 R. S. 1876, p. 810.

It is further insisted that, if the suit was well brought under that section, it was not instituted on the relation of the proper corporation. Counsel say in their brief: "The

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action must be brought by the State for the use of the proper township, town or city, that is, the school township, town or city, for the civil township, town or city has no interest whatever in causes of action existing in behalf of the school."

We think the suit was properly brought. It was brought on behalf of the school corporation of Richmond.

We think the court did not err in sustaining the demurrer to the paragraphs of answer mentioned. But, if it did, the action of the defendant in filing new additional paragraphs, to which a reply in denial was filed, under which evidence as to his entire defence could have been and was, we are satisfied, given, rendered the error harmless.

We think the record does not show that the remaining, viz., the seventh, eighth, ninth and tenth, errors were well assigned.

The point discussed by appellant's counsel under these assignments is that upon which the case of *Rock v. Stinger*, 36 Ind. 346, was mainly decided, viz., that a township trustee is not a mere bailee of money that comes into his hands by virtue of his office. The legal technical title to the money is in himself. The law of the above case is undoubted, but we do not see how it operates to the advantage of the appellant, for it decides that the trustee is liable to account for and pay over all such money, whether it be stolen, burned or loaned out. See *Shelton v. The State, ex rel.*, 53 Ind. 331.

Applying this doctrine to the case at bar, the appellant, by the judgment of the court, was held liable to account for and pay over no amount of money other than that which came into his hands by virtue of his office. The sums of money that formed the aggregate amount, for which the judgment below was rendered, were all paid to the appellant, out of the school fund, by the proper officer, and that amount he was bound to account for, and pay over.

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How it might be as to interest on the money that he received on the funds after they came into the treasurer's hands, we say nothing.

We have not sought to ascertain by what right or authority interest was paid on the orders upon the school fund, by the county treasurer, because the appellant can not raise the question of want of power in this case. *Rock v. Stinger supra*; *Marks v. The Trustees, etc.*, 56 Ind. 288. But it was paid—paid out of the school fund, was a part of that fund paid into the hands of the school treasurer, the appellant, in his official capacity, and which his official bond covered, and for which he was bound to account. Of this we think there can be no doubt. The appellant was paid a fixed salary for his services as such. The court found that the school trustees did not agree that he should have the interest in question in addition, and he was not entitled to it by law.

This case does not fall within *Rock v. Stinger*, 36 Ind. 346, and cases cited. We adhere to that case. The interest withheld in this case did not accrue on a deposit by Hadley.

The judgment is affirmed, with costs, as of the date of the submission.

Petition for a rehearing overruled.

NEFF v. THE MOORESVILLE AND WAVERLY GRAVEL ROAD CO.

TURNPIKE.—*Minimum Width of.*—Under the first specification of section 1 of the act of June 9th, 1852, 1 R. S. 1876, p. 664, "to amend acts of incorporation for the construction of plank roads and turnpike roads," the minimum width of a turnpike consisting of a single track is eight and one-half feet.

SAME.—*Gravel Road.*—The words "turnpike roads," as used in that act, include gravel roads.

66	279
147	329

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From the Morgan Circuit Court.

J. H. Jordan, G. W. Grubbs and M. H. Parks, for appellants.

W. R. Harrison and W. E. McCord, for appellee.

Howk, J.—This suit was commenced by the appellee, against the appellant, before a justice of the peace of Morgan county, to recover an amount claimed to be due and owing from the appellant, as tolls for his use of the appellee's road.

The trial of the cause before the justice resulted in a finding and judgment for the appellant, from which the appellee, the plaintiff, appealed to the circuit court.

The cause was tried by a jury in the court below, and a verdict was returned for the appellee, in the sum of twelve dollars; and the appellant's motion for a new trial having been overruled, and his exception entered to this ruling, judgment was rendered on the verdict.

The only error properly assigned by the appellant in this court is the decision of the circuit court in overruling his motion for a new trial. The causes assigned for such new trial were as follows:

1. The verdict of the jury was not sustained by sufficient evidence;
2. The verdict was contrary to law;
3. The court erred in giving the jury instructions numbered 1, 2, 3 and 5, at the appellee's request;
4. Error of law occurring at the trial; and,
5. Error of the court in refusing instruction 2, and in modifying instruction 1, asked by the appellant.

On the trial of this cause, the following facts were admitted, as shown by a bill of exceptions properly in the record:

"That the company" (the appellee) "was duly and legally organized; that the company established rates, and commenced taking tolls, in November, 1874; that, at the

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time plaintiff commenced exacting tolls, three miles of its road-bed was [were] gravelled, making a smooth track and forming a hard and even surface; that defendant was accustomed to travel upon said road, but refused to pay the tolls demanded, upon the alleged ground that the road was not completed—its track being too narrow, and not sufficient to accommodate, with convenience and safety, the ordinary travel of the public; that, if tolls were collected, defendant's toll on the road amounted to as much as the judgment herein, and was unpaid when this suit was commenced; and that the company never permanently maintained but one gate on its road, that being near the corporation line of the town of Mooresville, and there kept a gate and its by-laws, fixing the rates of toll, publicly posted."

Besides the facts thus admitted, much evidence was introduced by the parties on the trial, bearing upon the alleged ground on which the appellant had refused to pay the tolls demanded, namely, that the appellee's road was not completed, that its track was too narrow and was not sufficient to accommodate, with convenience and safety, the ordinary travel of the public. It will be seen therefore, that the main question for decision in this case, as well in this court as in the circuit court, may be thus stated: What are the requisites of a gravel or turnpike road, under the statutes of this State, to enable its owner to demand and exact tolls for its use by the travelling public?

Upon this question, the court below instructed the jury trying the cause, in substance as follows:

"3. The plaintiff is not by law required, before she could lawfully collect tolls from persons travelling on and using her road, to construct her road of any particular width, or of a double track. All she was required to do, to enable her to charge and force the collection of tolls of persons using it, was to make it either of plank, stone,

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gravel or other hard material, in such manner as to receive and maintain a smooth and permanent road, of a hard and even surface, not less than eight and a half feet in width, and so keep the same in repair as to be convenient for public travel, and as not to hinder or delay travellers for any unreasonable length of time.

"5. The fact that plaintiff's road at certain points is but of single track in width, and that at such points loaded vehicles can not pass each other, or can not pass each other without great care and precaution, is no defence to plaintiff's action for tolls due from defendant, if, near to such points, the road of plaintiff is of sufficient width for such vehicles to pass safely; and the hindrance or delay, which may be occasioned persons travelling or hauling on the road, in having to wait at such points until vehicles approaching or meeting them arrive at or pass them, is not such unreasonable hinderance or delay of travellers as will exempt them from liability for tolls for using the road. Therefore, if you find that plaintiff's road, during the period for which these tolls against the defendant were accruing, was in other respects sufficient, 'smooth and permanent,' 'hard and even,' and not less in its track than eight and a half feet in width, you should find for plaintiff and against defendant, for the amount of tolls accruing against defendant."

These two instructions are complained of by the appellant's counsel, in their brief of this cause in this court, as erroneous. It seems to us, however, that these instructions contain a full and fair statement of the requirements of the statutes of this State in relation to turnpike or gravel roads, and the rights and powers of the corporate owners of such roads to exact tolls for their use, from the public. The appellee was "duly and legally organized," under the provisions of "An act authorizing the construction of plank, macadamized, and gravel roads," approved

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May 12th, 1852, 1 R. S. 1876, p. 654. There is nothing in this act, which requires the appellant to construct its road of any specified width. In section 3 of said act, it is provided that the directors of such a corporation may determine the manner of construction, so as to secure and maintain "a smooth and permanent road;" and the "track" of such road was to be made of such "hard material" as would form "a hard and even surface."

It was an admitted fact, on the trial of this cause, that, at the time the appellee commenced the exaction of tolls, "three miles of its road-bed were gravelled, making a smooth track, and forming a hard and even surface." In section 13 of the above entitled act, as amended by an act approved February 28th, 1855, it is provided that whenever three consecutive miles of such a road have been completed, etc., the company may erect toll-gates and exact tolls not exceeding certain specified rates, 1 R. S. 1876, p. 659. In section 10 of said act, it was provided, that if such a company should suffer its road "to be out of repair to the hindrance or delay of travellers for any unreasonable length of time," it should have no right to collect tolls thereon, until its road was repaired. 1 G. & H. 477.

In this case the appellant based his refusal to pay the appellee tolls for his use of its road, upon the express ground that its road was not completed, and this for the sole reason that its track was "too narrow, and not sufficient to accommodate, with convenience and safety, the ordinary travel of the public." It is conceded by the appellant's counsel, as we understand them, that there is no provision in the above entitled act of May 12th, 1852, "directly fixing the legal width of gravel roads." After the passage of that act, the same General Assembly, at the same session thereof, passed an act entitled "An act to amend acts of incorporation for the construction of plank roads and turnpike roads," approved June 9th,

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1852. In the first clause of the first section of this latter act, it was provided, that all acts of incorporation theretofore granted for the construction of "plank roads and turnpike roads" should be amended as follows:

"*First.* Where they are now required to construct a double track either of plank or metal, the same may be changed to a single track, not less than eight and one-half feet in width." 1 R. S. 1876, p. 664.

It is very evident, we think, that the court, in its instructions, above set out, had reference to this clause of the statute, and regarded the same as an expression of the legislative will as to the minimum width of a single track road. It seems to us, that this provision of the statute was applicable to this case, and that the court did not err in either of the instructions, in regard to the necessary width of the appellee's road.

It is claimed by the appellant's attorneys, in argument, that the statutory provision last quoted is not applicable to the case at bar, because, both in the title and the body of the act, plank roads and turnpike roads are specifically mentioned, and gravel roads, such as the appellee's road, are not in terms alluded to. This construction of the statute is, we think, entirely too narrow and technical, and we are not inclined to adopt it. In Worcester's Dictionary a turnpike-road is defined to be "A road made by individuals, or by a corporation, on which tolls are collected." This definition is certainly broad enough to include gravel roads; on which, under the statutes of this State, tolls may be lawfully collected.

We are clearly of the opinion, therefore, that the appellant's objections to the instructions of the court, in regard to the minimum width of the appellee's road, are not well founded, and ought not to be sustained.

We find no error in the record.

The judgment is affirmed, at the appellant's costs.

 Salander v. Lockwood.

SALANDER v. LOCKWOOD.

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140	579

PRACTICE.—Supreme Court.—Record.—Inconsistency between Verdict and Answers to Interrogatories.—Bill of Exceptions.—The general verdict of a jury, interrogatories propounded to them, and their answers thereto, form parts of the record without a bill of exceptions; and, therefore, any inconsistency between the verdict and answers presents itself upon the face of the record without being alleged in the motion for a judgment on the answers notwithstanding the verdict.

SAME.—Case Overruled.—A simple verbal motion for such judgment, and an exception to the ruling thereon, present that ruling to the Supreme Court, without a bill of exceptions. *Shaw v. The Merchants National Bank, etc.*, 60 Ind. 83, overruled.

SAME.—Presumptions supporting Verdict.—Evidence.—Where, in such case, the evidence is not in the record, the Supreme Court will indulge every possible presumption in favor of the general verdict.

SAME.—Promissory Note.—Non Est Factum.—Delivery.—Negligence.—In an action by an endorsee, against the maker, on a promissory note payable in bank, wherein the execution of the note was duly put in issue, the jury found a general verdict for the plaintiff, and, in answer to interrogatories propounded by him, found that the defendant, being able to read, had negligently signed the note without reading it or having it read, and had impliedly delivered it, and that it was sold and endorsed to the plaintiff prior to the action, but that he had not used due diligence in purchasing it. They also found, in answer to interrogatories propounded by the defendant, that he had signed the note and laid it down, without knowing it to be a note; that, while the defendant was in another room consulting his wife concerning the same, the agent of the payee took possession of it, and carried it away without the defendant's consent; and that, upon his demand, the note was produced by the agent, and read and objected to by the defendant and not redelivered.

Held, on motion for judgment on the answers, the evidence not being in the record, that the general verdict implies that the note was in the custody of the payee as owner, and that the motion was properly overruled.

From the DeKalb Circuit Court.

J. I. Best and *C. A. O. McClellan*, for appellant.

P. J. Lockwood, *W. L. Penfield* and *C. E. Emanuel*, for appellee.

PERKINS, J.—This suit was brought upon a note of \$210.00, dated May 13th, 1875, due six months after date,

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payable at bank, and purporting to have been executed by the appellant to one A. W. Hall, and by him endorsed to the appellee.

The appellant denied its execution. Upon the issue thus formed a trial was had, and a general verdict was rendered for the appellee with a special finding of facts. The appellant moved the court for a judgment in his favor, upon the special finding of facts, notwithstanding the general verdict. This motion the court overruled, to which ruling the appellant excepted; and the court rendered a judgment upon the general verdict.

The appellant now assigns this ruling of the court as error, and the only question presented by the record is, should the appellant's motion for a judgment upon the special finding of facts, in his favor, have been sustained?

The general verdict is in the words following:

"We, the jury, find for the plaintiff, and assess the judgment at one hundred and twenty-five dollars (\$125.00). The costs of prosecution to be equally divided between plaintiff and defendant."

The special findings are as follows:

Interrogatories propounded by plaintiff:

"1. Did not the defendant sign the note sued on?"

"Yes.

"2. Was not the defendant able to read when he signed the note sued on?"

"Yes.

"3. Did the defendant try to read the note, or did he ask to have it read, before signing it?"

"No.

"4. Did not the defendant sign and deliver the note?"

"By implied delivery.

"6. Was not the defendant negligent in signing the note without reading or having it read?"

"Yes.

"7. Is not the plaintiff an innocent purchaser before maturity, in good faith and for a valuable consideration?

"Yes, but did not use due diligence in the purchase of the same.

"8. Did not the defendant execute the note before supper?

"Yes, by implied delivery.

"10. Did not the defendant know that Nelson took the papers after supper?

"Yes.

"13. Was not the note sold and endorsed to plaintiff before this suit was begun?

"Yes."

Interrogatories propounded by appellant:

"1. Did the defendant deliver the note sued upon?

"Yes, by implied delivery.

"2. Did not Nelson, the agent of the payee, after the defendant had signed, read and laid the note upon a table, and had left the room to consult his wife about the note, take it from the table and carry it away in the absence of the defendant?

"Yes.

"3. Did Nelson take the note sued upon from a table where the defendant had laid it, and carry it away without the defendant's consent?

"Yes.

"5. Did defendant know he was signing a note until after it was signed?

"No.

"4. Did defendant know, before he read the note, that he had signed the note?

"No.

"6. Did not defendant, after he had signed the papers, take up one and commence its reading, and while so engaged, and before he had time to read it, the agent

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of the payee took the others and put them in his pocket?

"Yes.

"7. After reading one of the papers, did not defendant demand the others of Nelson, and, when the note was produced, defendant read and objected to it?

"Yes.

"8. After defendant read the note, did he deliver the note?

"No."

Thus far we have copied from appellant's brief. There is a little confusion in the order of the interrogatories and the answers thereto, but, on comparing them with the record, we find they are all embraced in the above copy.

The defendant moved in writing "for judgment in his favor on the special findings of the jury, notwithstanding the general verdict." The record proceeds: "The motion of defendant for judgment on the special findings is now by the court overruled, to which ruling defendant excepts. The defendant now files his motion for a *renire de novo* herein, in these words [*he.in.*], which motion is by the court overruled, to which the defendant excepts, and files his motion for a new trial herein in these words [*he.in.*], which motion is by the court overruled, to which ruling the defendant excepts, and the defendant is given thirty days in which to file his bill of exceptions herein." Thereupon judgment was rendered for the plaintiff upon the general verdict. No bill of exceptions appears in the record.

The only error assigned is as follows:

"The court erred in overruling appellant's motion for judgment in his favor, on the special findings of the jury, notwithstanding the general verdict."

Is this error, if it be one, presented for the consideration of this court, in the absence of a bill of exceptions?

It is provided by section 559 of the code that:

"All proper entries made by the clerk, and all papers pertaining to a cause, and filed therein, (except a summons for the defendant, where all persons named in it have appeared to the action, and summons for witnesses, depositions, and other papers which are used as mere evidence) are to be deemed parts of the record; but a transcript of motions, affidavits, and other papers, when they relate to collateral matters, and depositions, and papers filed as mere evidence, shall not be certified, unless made a part of the record by exception, or order of court," etc.

Section 345 of the code is this: "Where the decision objected to is entered on the record, and the grounds of the objection appear in the entry, the exception may be taken by the party, causing to be noted at the end of the decision that he excepts."

The first clause of section 346 of the code reads thus: "Where the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exception to writing, and present it to the judge for his allowance and signature."

General and special verdicts and answers to interrogatories are a part of the record, without bills of exceptions. 2 R. S. 1876, p. 171.

Their inconsistency, therefore, if inconsistency exists, with the general verdict, appears upon the face of the record, and the statute points out the duty of the court in such case. Sec. 337 of the code declares that, "When the special finding of the facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."

We think a motion in writing for judgment on the special findings, and the ruling of the court thereon, which must appear on the record, are all that is necessary, in connection with the verdicts already in the record, to present

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the decision of the court, and the reasons of it, and that no bill of exceptions is necessary. As to this point, *Shaw v. The Merchants National Bank*, 60 Ind. 83, is overruled.

We remark, that it was not necessary that the motion should be in writing. The journal entry would show the making of the motion. The reasons, if any existed for it, appeared by the verdict and answers to interrogatories.

The remaining question in the cause is, were the special findings inconsistent with the general verdict.

As to the degree of inconsistency or antagonism that must exist, the rule is that it must be such as is "beyond the possibility of being removed by any evidence legitimately admissible under the issue." *Amidon v. Gaff*, 24 Ind. 128; *Ridgeway v. Dearing*, 42 Ind. 157; *Graham v. Graham*, 55 Ind. 23.

The evidence in the case at bar is not in the record. The court, therefore, will indulge every possible presumption in favor of the general verdict.

The general verdict implies that the note sued on was in the custody of the payee, as owner, with the consent of the maker. If it was so, a delivery would be inferred. It is not denied that the apparent maker signed the note, and that it passed into the possession of Nelson, the agent of the payee; but it is claimed that it was without the consent of the signer.

Now, it appears by the seventh interrogatory propounded by the appellant, and the answer thereto, that the signer demanded the note of Nelson; that it was thereupon produced to and read by him; that he objected to it; and, according to the eighth interrogatory, he did not, after reading the note, redeliver it.

Now, suppose the facts were, that when Salander, the signer, called for the note, Nelson or some other person produced and read it to him, or permitted him to read it, in the hands of such person; that he made some slight

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objection to it (the answer to the interrogatory does not disclose the objection he made); that he became satisfied as to the objection, and permitted Nelson to retain the note, for his principal. In such case, the possession of the principal or his agent would be legal, without a formal redelivery of the note. *Scheible v. Law*, 65 Ind. 332.

In short, evidence might have been given, showing acquiescence, finally, of the maker, in the note in question, and the general verdict includes the finding of such fact.

The judgment is affirmed, with costs.

AYERS v. HARSHMAN ET AL.

PROMISSORY NOTES SECURED BY MORTGAGE.—*Action by Assignee of Payee.*

—*Defence by Assignee of Equitable Owner.*—*Attacking Judgment Collaterally.*—*Divorces.*—*Husband and Wife.*—*Jurisdiction of Common Pleas Court.*—

Process Presumed.—*Notice.*—In an action by an assignee, against the maker, a purchaser of the equity of redemption, and a junior mortgagee, to collect several non-commercial promissory notes, and to foreclose a mortgage on real estate, executed by the maker to secure payment of the notes, all the defendants answered jointly, and the latter two filed a counter-claim, alleging that the husband of the payee, being the owner of the lands, was persuaded by the payee and her paramour to convey the same to her, without consideration; that the payee and her husband conveyed the lands to the mortgagor, who executed to the payee the notes and mortgage in controversy, for the purchase-money; that the payee and her paramour then eloped, taking with them the notes and mortgage; that the husband thereupon, on due notice to the wife and the mortgagor, sued for and obtained, in the common pleas court, a decree of divorce, a judgment that the notes and mortgage were in equity his, and an injunction commanding her, and all claiming under her, to surrender the notes and mortgage to the husband, and forbidding the mortgagor from paying the same to her or her assigns; that afterward the mortgagor and the purchaser of the equity of redemption had purchased of the husband the notes and mortgage in question, taking an assignment of the said decree as evidence of their ownership; and that the plaintiff had purchased the notes

66	291
134	427

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subsequently, in bad faith, for an inadequate consideration, and with notice of the husband's rights and decree.

Held, on demurrer, that, regardless of whether or not the complaint for divorce was sufficient, the answer and counter-claim were sufficient.

Held, also, that the common pleas court had jurisdiction to render such decree, and that, as nothing to the contrary appears, notice to the defendants therein is presumed.

Held, also, that such decree could not be attacked collaterally.

From the Clinton Circuit Court.

J. Claybaugh, R. P. Davidson, J. C. Davidson, J. C. Suit and—*Higinbotham*, for appellant.

L. McClurg and J. V. Kent, for appellees.

BIDDLE, J.—Complaint, by the appellant, against Enos Harshman, Amos Heavilon and Leonidas Mitchell, founded upon eight several promissory notes, alleged to have been executed by Harshman to Rebecca Bailey, wife of Bazzel Bailey, and assigned by endorsement, by both Bazzel and Rebecca, to the appellant; and to foreclose a mortgage by which the notes are secured.

It is averred, that Heavilon is a junior mortgagee, and that Mitchell subsequently purchased the land mortgaged.

1. Joint answer, by all the defendants, of general denial;
2. Separate answer by Harshman of payment;
3. Separate answer by Heavilon, admitting the facts as averred in the complaint;
4. Joint answer of all the defendants, in substance as follows:

That, in the year 1872, Bazzel Bailey commenced suit by complaint in the court of common pleas of Clinton county, Indiana, against Rebecca Bailey, his wife, and Enos Harshman, alleging his marriage to Rebecca, and that afterward he became the owner of valuable lands; that Rebecca and Henry DeLuse, her paramour, falsely and fraudulently persuaded Bazzel to convey said lands to

Rebecca, through Samuel O. Bayless, their trustee, which was done without consideration; that afterward Bazzel and Rebecca sold and conveyed the said lands to Harshman, who executed the notes and mortgage sued on to Rebecca; that no part of the purchase-money was paid; that afterward Rebecca eloped with DeLuse, her paramour, taking with her the said notes and mortgage and sixteen hundred dollars in money; that the prayer of Bazzel was,—

1. For a divorce from Rebecca;
2. That he be declared the owner of the notes and mortgage;
3. That Rebecca be required to surrender them to Bazzel;
4. That Harshman be enjoined from paying the notes to Rebecca or any person holding them under her; that the complaint and other papers in said case have been lost, and, upon diligent search, can not be found; that said Rebecca and Harshman were duly notified of said suit, but made default therein; that, upon hearing, the court found the facts to be true as averred in the complaint, and decreed,—

1. The divorce as prayed;
2. That Bazzel was the rightful owner of the notes and mortgage;
3. That Rebecca and all persons holding under her be required to surrender the notes to Bazzel; that Harshman be enjoined from paying said notes to Rebecca or any person claiming under her; that Harshman pay the said notes as they become due, to Bazzel.

And further averred, that the plaintiff is not the *bona fide* holder of said notes and mortgage; that he purchased them for an inadequate consideration and with a full knowledge of the rights of Bazzel Bailey and his assigns, and with full knowledge of the

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existence of said judgment and decree; that afterward Harshman and Mitchell purchased from Bazzel, for a valuable consideration, the notes and mortgage sued on; and that, as Bazzel had not the notes and mortgage in possession—they being still in the possession of Rebecca—to evidence the transfer of said notes and mortgage to Harshman and Mitchell, Bazzel assigned the said decree vesting the notes and mortgage in him, to the said Harshman and Mitchell, upon the record thereof, in writing, properly attested by the clerk of the court of common pleas, all of which is formally averred, with dates and venue. By means, etc. Wherefore, etc.

5. Harshman and Mitchell filed what they call a cross complaint, but which is a counter-claim, setting out the notes and mortgage, the decree of the court of common pleas, and averring the same facts as those set up in the fourth paragraph of answer, praying affirmative relief,—that the plaintiff be required to surrender the notes and mortgage, and that they be cancelled.

Separate demurrers, alleging the want of facts as ground, were overruled to the fourth paragraph of answer and the counter-claim, and exceptions reserved. Reply in denial to the answer, and answer in denial to the counter-claim, and a second paragraph of answer to the counter-claim, that Rebecca had no notice of the suit pending in the court of common pleas upon which the decree set up was rendered. Reply to second paragraph of answer to the counter-claim, that Rebecca had notice of said suit. Bazzel separately, as to the counter-claim, filed a disclaimer.

Upon these issues a trial by a jury was had, and a general verdict returned in favor of the defendants. In answer to special interrogatories the jury also found: 1, the amount due upon the matured notes; 2, the several amounts to become due on the notes not due, and the dates; and 3, the reasonable amount of an attorney's fee.

The appellant moved for a judgment in his favor, on the facts in the special finding. His motion was overruled and he excepted. He then moved for judgment in his favor, on the facts in the special finding, and on the pleadings. His motion was overruled, and he excepted. Motion for a new trial; causes filed; motion overruled; exception; judgment for appellee on the verdict; appeal.

The appellant makes three points against the sufficiency of the fourth paragraph of answer, and three points against the counter-claim, on demurrer, which, as the two pleadings are essentially the same, may be considered together.

1. That the court of common pleas had no jurisdiction over the subject-matter.

We are of a different opinion. At the time the proceedings were commenced and the decree rendered, the court of common pleas had jurisdiction to grant divorces, and grant all relief incident thereto. *McFarland v. McFarland*, 40 Ind. 458.

2. That no ground for divorce is alleged in the complaint.

We think there is; but, if there were not, the proceedings and decree would not be void, and, unless void, can not be impeached collaterally. *Evans v. Ashby*, 22 Ind. 15; *Abdil v. Abdil*, 33 Ind. 460; *Gavin v. Graydon*, 41 Ind. 559.

3. That the court had no jurisdiction over the parties to the suit.

The fourth paragraph of the answer and the counter-claim both aver notice to the defendants, and that the court found that they had been properly notified, and that the court had jurisdiction over the parties; but the court of common pleas being a domestic court of superior though not of general jurisdiction, and it having been shown that it had jurisdiction over the subject-matter in

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the given case, notice to the parties to the suit would be presumed, where the record does not show the contrary • *Abdil v. Abdil, supra.*

We conclude therefore, that the fourth paragraph of answer; and the counter-claim, were each sufficient; and perhaps they would have sufficient, even though we held the decree set up to be void, because each of them shows, by other averments, that Harshman and Mitchell bought the notes and mortgage in controversy of Bazzel Bailey, before Bazzel and his wife had assigned them to the appellant. Now, as both parties claim the notes and mortgage from Bazzel and his wife, and as the averments show, independently of the record and decree, that the wife had no legal right to them, that they were the property of Bazzel solely, that the defendants purchased them from Bazzel before he sold them to the plaintiff, and that the plaintiff bought them for an inadequate consideration, in bad faith, with full notice of their sale and transfer to the defendants, we can not see why the facts averred do not constitute a good defence to the action; indeed, it seems to us, as the notes are not commercial paper, if the plaintiff bought them in good faith, for a valuable consideration, without notice, after they had been sold and transferred to the defendants in good faith, for a valuable consideration, that still he could not recover. We are well satisfied that the court did not err in overruling the separate demurrers to the fourth paragraph of answer and to the counter-claim.

It seems to us that this view settles the case; for, if we are right, it is clear that the court did not err in giving the instructions to the jury which were excepted to by the appellants, and did not err in refusing the instructions asked by the appellant; indeed, the instructions are not discussed by the appellant in the brief of his counsel, and it is plain to us that the evidence sustains the verdict. It is also

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plain that the appellant was not entitled to judgment in his favor on the facts stated in the special finding. They simply find the amount due, and to become due, on the notes, and the amount of the attorney's fees, but do not find that any amount was due to appellant, nor that the notes were the property of the appellant. These facts are not inconsistent with the general verdict.

The judgment is affirmed, at the costs of the appellant.

Opinion filed at November Term, 1878.

Petition for a rehearing overruled at May Term, 1879.

TAYLOR v. SHELKETT.

PRACTICE.—*Supreme Court.*—*Assignment of Error.*—*New Trial.*—*Instructions.*—Error in giving or refusing instructions, and "error of the court on the trial," are grounds for a new trial, but can not be assigned in the Supreme Court, as error.

SAME.—"Error of law occurring at the trial," assigned in that manner as ground for a new trial, is too vague and indefinite to present any question.

SEDUCTION.—*Action by Parent.*—*Measure of Damages.*—*Excessive Damages.*—In an action by a father, to recover damages for the seduction of his infant daughter, he is entitled to recover, if at all, as well for his wounded feelings and for the dishonor brought upon him, as for the loss of his daughter's services; and the amount of the damages is a question for the jury.

From the Greene Circuit Court.

A. G. Cavins, E. H. C. Cavins and R. R. Taylor, for appellant.

E. E. Rose and E. Short, for appellees.

PERKINS, J.—Suit by Augustus W. Shelkett, against Ham L. Taylor, for the seduction of the infant daughter of the former.

Answer, the general denial.

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Trial by jury; verdict for the plaintiff, and an award of twelve hundred and fifty dollars as damages. A motion for a new trial was denied, and judgment rendered on the verdict. Appeal.

The assignment of errors is as follows :

" 1. Error of the court in instructing the jury, excepted to by appellant ;

" 2. Error of the court in refusing to give instructions to the jury, asked by appellant ; excepted to by appellant ;

" 3. Error of the court, on the trial of the cause ; excepted to by appellant ; and,

" 4. Error of the court in refusing to grant a new trial ; excepted to by appellant."

The motion for a new trial assigned as causes therefor :

" 1. The damages assessed by the jury are excessive ;

" 2. The verdict of the jury is not sustained by sufficient evidence ;

" 3. The verdict of the jury is contrary to law ; and,

" 4. Error of law occurring at the trial, and excepted to by the defendant."

As to the assignment of errors, section 568 of the code, 2 R. S. 1876, p. 244, provides, that upon appeal there must be " a specific assignment of all errors relied upon." The first, second and third assignment of errors are not specific, and will not be further noticed. See notes to the section of the code above quoted from. Besides, the matters alleged in them for errors were all grounds for a motion for a new trial, and were only assignable as such, and were not assignable as errors, in this court. *Westerfield v. Spencer*, 61 Ind. 339.

Failing to make them grounds in a motion for a new trial was a waiver of the alleged errors. *Lures v. Botte*, 26 Ind. 343 ; *Branham v. Record*, 42 Ind. 181.

The fourth assignment of error was specific, viz., that the court erred in refusing to grant the motion for a new trial. We enquire as to the truth of this assignment.

The first cause stated in the motion for the new trial was excessive damages.

To intelligently rule upon this point, we must look at the facts of the case. The seduced girl was a witness. She testified :

“ I am the daughter of the plaintiff; am nineteen years old, past. Father lives three quarters of a mile from Switz City. I am unmarried; I was four years old when my mother died; have known defendant five years; he was a merchant at Switz; I was fourteen years old when I first got acquainted with him; I was keeping house for my father; I got acquainted with defendant at his store, when I was trading; he came to see me quite a number of times before he was married; he came to see me three years, while single; he came frequently, week days and Sundays; he came generally when father was absent; father and brother were generally away from the house, on the farm, when he came; I am mother of a child; it was born June 5th, last; Ham Taylor, the defendant, is the father of the child; my child was begotten on the 4th day of September, 1875, at father's house; I yielded to have intercourse with the defendant because I loved him; I first formed my love for him when he was coming to see me as a single man; there was no one at home on the day the child was begotten; he and his wife lived at Switz City; the child is still living.” See *Bell v. Rinker*, 29 Ind. 267.

The father had paid the expenses incident to the “lying-in” of his daughter.

The bill of exceptions contains this statement :

“ It was admitted by defendant that plaintiff's character has always been good; and that Kit's (his seduced daughter's) general reputation was good until it was discovered that she was pregnant.”

Under such circumstances, we can not say the damages in the case, given by the jury, were excessive.

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Where a man of respectable position in society takes advantage of a comparatively unprotected, motherless daughter, of respectable family, to win her affections only to enable him to ruin her, which ruin he accomplishes in her father's house, in which she is house-keeper, it is very difficult to determine the exact amount that should be paid as "a compensation for the dishonor and disgrace cast upon" that father, and for his wounded feelings, which compensation he has a right to recover in an action for the seduction, as well as that for loss of services. *Felkner v. Scarlet*, 29 Ind. 154; *Pruitt v. Cox*, 21 Ind. 15; *Shattuck v. Myers*, 13 Ind. 46, on page 52. See *Coleman v. White*, 43 Ind. 429.

A subject for moral and social reasoning, not of mathematical demonstration, is presented.

The record does not show the existence of the second and third causes assigned for a new trial.

The fourth assignment is bad on account of vagueness. *Grant v. Westfall*, 57 Ind. 121.

In *Mason v. Moulden*, 58 Ind. 1, the third cause for a new trial was assigned in these words:

"Error of law occurring at the trial, and excepted to by the defendants."

The court say: "The third cause assigned is too indefinite to raise any question. This has been decided so often that a reference to the decisions is unnecessary."

See *Nofsinger v. Reynolds*, 52 Ind. 218, on p. 226.

The record presents no further question for decision.

The judgment is affirmed, with costs and five per cent. damages.

Petition for a rehearing overruled.

MAXWELL ET AL. v. MOREHART.

PROMISSORY NOTE.—*Payable in Bank.*—*Negligence.*—One, who, supposing that he is executing a simple article of agreement, executes a promissory note payable in bank, is guilty of negligence, and is liable thereon to a *bona fide* endorsee for value and before maturity, though given wholly without consideration.

From the Pulaski Circuit Court.

S. Adams, G. T. Wickersham and R. O. Johnson, for appellants.

Howk, J.—This was a suit by the appellants, against the appellee, on a promissory note, of which the following is a copy :

“\$120.00 OAK PORT, INDIANA, July 6th, 1875.

“Four months after date, I promise to pay to the order of William Hammond, at the First National Bank of Delphi, one hundred and twenty dollars, with interest at the rate of ten per cent. per annum after maturity, the interest until maturity at that rate having been paid in advance, and attorney’s fees, value received, without any relief whatever from valuation or appraisement laws. The drawers and endorsers severally waive presentment for payment, protest, notice of protest and non-payment of this note.

(Signed,)

“DAVID MOREHART.”

It was alleged in the appellants’ complaint, *inter alia*, that the note, before maturity, was assigned to the appellants, “by endorsement thereon in writing,” and a copy of the note and of its endorsement was filed with and made parts of the complaint, and that the note was due and wholly unpaid. Wherefore, etc.

To the appellants’ complaint, the appellee answered in two paragraphs, in substance as follows :

1. A general denial ; and,
2. That the payee of the note, William Hammond,

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came to the appellee's house, in Van Buren township, Pulaski county, Indiana, and represented to the appellee, that he was appointing agents throughout the county, for the sale of a new and valuable improvement in churns, called the "Johnson Smith" churn, and that he desired to appoint the appellee his agent for the sale of said churns, for said Van Buren township; and it was agreed by and between the appellee and said William Hammond, that the appellee should accept such agency; that, during the negotiations relating to such contract, nothing was said between said parties about the execution of a promissory note by the appellee to the said Hammond, or to any one else; that it was agreed and understood that the appellee, if he should accept such agency, was to sell such churns, and account to said Hammond, or to his agent, for the proceeds arising from the sale thereof, after deducting his commissions for such sales, and that a settlement was to be had and made between the parties every four months; that the appellee was to keep, as commission, a per cent. of the gross amount of sales, and pay the residue of such sales to said Hammond, at the time of such settlements; that the said Hammond made no mention, during all of said negotiations, about any promissory note, or about any amount to be paid by the appellee, except as hereinbefore specified; that no such note as was in the complaint named was read to or shown the appellee by said William Hammond, and that, if any such note was contained in the paper signed by the appellee, it was so disguised and concealed by said Hammond and the language of said agreement, that the appellee could not, with reasonable diligence, have discovered the same; that the appellee was a farmer, and not accustomed to trade in such things, nor in patents of any kind; that the appellee was defective in his eyesight and could not see to read writing or print, without spectacles, and had no spectacles at the

time, and was unable to read any thing written, and merely signed his name on the paper at the place specified and pointed out to him by said Hammond; that he, the appellee, never gave said note to said Hammond or to any other person, and that, if his signature was to said note, it was obtained thereto without his knowledge or consent, and by some fraudulent means to him unknown, and which he could not have prevented by the use of due diligence; that he had never sold or disposed of any of said "Johnson Smith" churns. Wherefore the appellee said, that he should not be compelled to pay said note, and asked judgment for costs.

To this second paragraph of answer the appellants demurred, upon the ground that it did not state facts sufficient to constitute a defence to their action; which demurrer was overruled by the court, and to this ruling they excepted, and then replied to said paragraph, by a general denial thereof.

The issues joined were tried by a jury, and a verdict was returned for the appellee; and the appellants' motion for a new trial having been overruled and their exception entered to this decision, judgment was rendered on the verdict.

The appellants have assigned as errors the following decisions of the court below:

1. In overruling their demurrer to the second paragraph of appellee's answer; and,
2. In overruling their motion for a new trial.

The controlling question for decision in this case, as it seems to us, is this: Are the facts stated in the second paragraph of the appellee's answer, sufficient to constitute a valid defence in his behalf to the appellants' suit on his note, under the law of this State?

The appellee was a witness for himself on the trial, and in his evidence he testified, substantially, to the same facts,

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set up by him as a defence in the second paragraph of his answer. If, therefore, those facts were sufficient to constitute a defence for him to the appellants' action, it might well be said, we think, that there was evidence in the record, tending to sustain the verdict, and we could not disturb it. So that the only question for our decision is, are the facts pleaded by the appellee in the second paragraph of his answer a valid and legal defence for him to the appellants' action?

The note in suit was payable at a bank in this State, to the order of the payee. It was negotiable, therefore, as an inland bill of exchange, and the appellants, as the endorsees thereof, might recover thereon as upon such a bill. 1 R. S. 1876, p. 636, sec. 6. In other words, the note sued upon in this action is governed by the law merchant, as applicable to inland bills of exchange. Under the law merchant, the appellants, as the endorsees of the note in suit, before its maturity, in good faith, for a valuable consideration and without notice, (all of which must be presumed, in the absence of any averment or showing by the appellee to the contrary,) took such note free from all the equities and defences which might have existed between the appellee, as the maker, and the said William Hammond, as the payee, of such note. *Murphy v. Lucas*, 58 Ind. 360; *Cornell v. Nebeker*, 58 Ind. 425; *Bremmerman v. Jennings*, 60 Ind. 175; and *Bremmerman v. Jennings*, 61 Ind. 334.

Perhaps, the facts stated in the second paragraph of the appellee's answer in this case would have constituted a good defence for him to a suit on the note by William Hammond, the payee thereof; but, however this might have been, it is very certain, we think, that the rights of the appellants, as the endorsees of the note in good faith, without notice and for a valuable consideration, before the maturity of the note, ought not to have been, and were not,

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affected by any of the facts alleged in said second paragraph of answer. It can not be questioned, as it seems to us, that the appellee, upon the facts stated in said second paragraph of his answer, was guilty of negligence in failing to use reasonable care to inform himself of the character and contents of the instrument he executed; and in such a case, having executed, as he did, a note negotiable as an inland bill of exchange, he must be held liable to the appellants, as the endorsees of such note, before maturity, in good faith, without notice and for a valuable consideration. *Nebeker v. Cutsinger*, 48 Ind. 436; and *Cornell v. Nebeker*, *supra*.

For the reasons given, it is very clear, we think, that the court erred in overruling the appellants' demurrer to the second paragraph of the appellee's answer.

The judgment is reversed, at the appellee's costs, and the cause is remanded with instructions to sustain the appellants' demurrer to the second paragraph of the appellee's answer, and for further proceedings in accordance with this opinion.

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SHERIFF'S SALE.—*Injunction of Sale on Vendi. after Death of Judgment Plaintiff.—Contract to Preserve Lien.—Widow.—Insolvency.*—In an action by the judgment defendant, against a sheriff and others, to enjoin the sale of personal goods seized on an execution issued on a judgment after the death and in the name of the judgment plaintiff, and without the appointment of any administrator or executor, the defendants answered that the judgment plaintiff had died intestate, and free from debt, leaving his widow as his only heir; that in his lifetime, after the issue of execution and a partial payment thereon, the judgment plaintiff had extended the time of payment on the agreement of the judgment defendant, that successive executions might remain in the hands of the sheriff, as a lien on the property; that, after his death, such agreement was continued between his widow and the judgment defendant, and partial payment was made by the latter to her, and delivery bonds executed by him as each execution issued;

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that he had become utterly insolvent, having no other property out of which the execution could be satisfied; that the execution complained of was a *vendi.* issued for the sale of such property; and that an administrator of the intestate has been appointed since the filing of the complaint. *Held,* on demurrer, that the answer is good.

From the Elkhart Circuit Court.

R. M. Johnson, J. D. Osborn and E. G. Herr, for appellants.

J. H. Baker, J. A. S. Mitchell and H. D. Wilson, for appellee.

PERKINS, J.—Milton Mercer filed a complaint in the Elkhart Circuit Court, in which he alleged, “that on the 21st day of March, 1872, one Samuel H. Kinsey obtained, in the Elkhart Circuit Court, a judgment against him for \$742.50 and costs; that a portion of said judgment is still unpaid; that on the 2d day of April, 1873, said Kinsey died, leaving a widow, unpaid debts and an unsettled estate; that he died testate, leaving a will in which he made divers large bequests; that on the 10th day of November, 1873, Rush M. Johnson, pretending to be the attorney of said Kinsey, deceased, caused a pretended execution to be issued by the clerk of said court upon said judgment, in favor of said deceased plaintiff, and against the goods and property of the plaintiff in this suit, and caused the same to be unlawfully levied upon his goods, and he, supposing an administrator had been appointed or executor qualified upon said estate of said Kinsey, deceased, who had procured the issue of said execution, executed a delivery bond for the property levied on; that afterward said Johnson procured a *vendi.* for the sale of said property to be placed in the hands of ——— Egbert, the sheriff, who is about to sell said property thereon,” etc.

Copies of the execution, etc., were made exhibits. He prayed an injunction. A temporary injunction was granted.

Afterward a demurrer was overruled to the complaint, and an answer, as follows, was filed : It admitted the obtaining of the judgment, the death of Kinsey, etc., but averred that prior to his death an execution was issued and delivered to said sheriff, and became a lien on the property levied on ; that, in consideration that said Kinsey would give further time on said judgment, said Mercer, plaintiff in this suit, in said Kinsey's lifetime, agreed with him that an execution should remain continuously in said sheriff's hands, so as to keep in force the lien on said goods, until said judgment should be paid ; that, in pursuance of said agreement, the said subsequent executions were issued ; that they deny that there are any debts of said decedent unpaid, and deny that he died testate, but averred that he died intestate, leaving Mary Kinsey his widow and sole heir, who thereupon assumed the control of his estate, and, in pursuance of the agreement above mentioned, caused an execution to be issued in the name of said Samuel H. Kinsey ; that thereupon the plaintiff, Mercer, knowing the death of said Samuel H., and recognizing the right of said Mary Kinsey to said judgment, paid to her the sum of \$200, and agreed with her, in consideration that she would give him further time for the payment of the remainder of said debt (and in pursuance of said original agreement), that he would turn out to the sheriff, upon said execution, enough personal property to secure the same ; that afterward, viz., November 10th, 1873, the said Mary caused another execution to issue in the name of Samuel H. Kinsey, upon said judgment, and the plaintiff, well knowing the fact, paid thereon to the sheriff and to said Mary, the further sum of \$450, on November 21st, 1873, and then and there agreed with said Mary, that if she would give further time for the payment of the remainder on said execution, and in consideration therefor, he, the plaintiff, said Mercer, would

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turn out to the sheriff thereon personal property sufficient to secure the same, and pay to her the amount remaining due on said judgment; that pursuant to said agreement said Mary did give further time, and the plaintiff did turn out to the sheriff, and the sheriff did levy said execution on, the personal property mentioned in the complaint, which is the levy and seizure therein referred to, and thereupon the plaintiff, Mary, executed a delivery bond for the return of said goods to the sheriff in case he did not pay said execution; that said Mary Kinsey, relying upon said promises of said plaintiff, delayed the collection of said judgment, till the 15th day of May, 1874, when she caused the *vendi.* referred to in the complaint to be issued, and the said goods to be seized by virtue thereof; that, at said last mentioned date, said plaintiff was wholly insolvent and had transferred and incumbered said property, so that the collection of said debt could not be made under a new execution issued upon said judgment, and the plaintiff still remains wholly insolvent, with no property from which said debt can be collected unless said sale be allowed to proceed; that defendant Johnson acted only as agent and attorney in all that he did in said matter, and said defendant Egbert acted as sheriff in the levy and seizure of said goods, and as such was proceeding to sell the same at the time of filing the complaint herein. And defendants further aver, that since the beginning of this action, viz., on the 11th day of February, 1875, Thomas Miller was duly appointed administrator of said estate of Samuel H. Kinsey, deceased, and will be entitled as such, to receive all moneys collected on said judgment.

The court sustained a demurrer to this answer, for want of facts, and exception was entered.

The defendants declined to amend or answer further, and the court granted a perpetual injunction. Appeal and submission of the cause by agreement.

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In the assignment of errors, two are alleged :

1. Overruling the demurrer to the complaint;
2. Sustaining the demurrer to the answer.

Joinder, denying that there is any error in the record.

We condense a statement of facts mostly from the answer :

On the 21st of March, 1872, Samuel H. Kinsey obtained, in the Elkhart Circuit Court, a judgment against Milton Mercer, for \$742.50; during the lifetime of said Kinsey an execution was issued upon said judgment; in consideration that an execution was to be kept continuously in the hands of the sheriff so that the lien of the first execution should not be lost, said Kinsey extended the time on said execution; that on the 2d day of April, 1873, said Kinsey died, intestate, leaving no debts to be paid, and a widow who was his sole heir, and assumed the control of the estate of the deceased, and the collection of said judgment; that said Mercer continued the arrangement with said widow and heir, for the keeping in the hands of the sheriff an execution to perpetuate the lien on the property, in consideration of time given, said Mercer regularly executing delivery bonds for the property; that he paid to said widow and heir, at one time, \$200, and at another \$450, making in all \$650 of said \$750 judgment; that, on the 18th of May, 1874, said widow and heir caused a *vendi.* to issue for the sale of said property then levied upon and for the surrender of which for sale a delivery bond was held, etc.

And the question arises, what necessity for, what merit was there in, this application for an injunction? What justice was there in granting it? See 2 R. S. 1876, p. 93, sec. 137, as to when injunctions may issue; also Bicknell Civil Prac. 175, *et seq.*

Mercer, the appellee, owed the money due on the judgment. This is conceded. Could he have safely paid it on the execution? We think so, for two reasons :

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1. The judgment was the property of said widow and heir of the deceased, Samuel H. Kinsey; the execution was issued at her instance, and her reception of and receipt for the money due upon it would have been a complete discharge of Mercer, the execution defendant. No administrator existed, and none was required. *Westerfield v. Spencer*, 61 Ind. 339.

It was not necessary that the judgment should have been revived before execution issued. *Armstrong v. McLaughlin*, 49 Ind. 370.

2. The execution issued was not void, and a sale under it might have been valid. Payment of the execution to the sheriff would have been valid.

In this case, it will be borne in mind, it was the execution plaintiff, not the execution defendant, who died. In *Murray v. Buchanan*, 7 Blackf. 549, it is decided that :

“If the plaintiff die after a *fieri facias* sued out, it may be executed notwithstanding, and his executor or administrator shall have the money; or if the plaintiff has made no executor, or administration is not granted, the money must be brought into court and deposited, until there be a representative to receive it.” *Doe v. Hayes*, 4 Ind. 117; *Ewing v. Hatfield*, 17 Ind. 513.

A *vendi.* may issue after the death of the judgment plaintiff. *Doe v. Hayes*, *supra*.

The irregularities in this case were all committed under an agreement with the execution defendant, and for his benefit, and were, therefore, waived by him. To this point, the authorities are numerous and direct. *McClure v. McCormick*, 5 Blackf. 129; *Doe v. Harter*, 1 Ind. 427; *Doe v. Dutton*, 2 Ind. 309; *May v. Johnson*, 3 Ind. 449; *Cooley v. Harper*, 4 Ind. 454; *The State v. Melogue*, 9 Ind. 196; *Stockwell v. Byrne*, 22 Ind. 6; *Sullivan v. Winslow*, 22 Ind. 153; *Culbertson v. Milhollin*, 22 Ind. 362; *Zug v. Laughlin*, 23 Ind. 170.

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As to the death of the judgment defendant, our statute, sec. 488, 2 R. S. 1876, p. 222, provides that:

"The death of the defendant, after the execution is placed in the hands of the sheriff to be executed, shall not affect his proceedings thereon, that the amount of property, allowed absolutely to the widow of the decedent, shall be exempt from levy and sale under such execution." See the notes to this section. The court erred in sustaining the demurrer to the answer.

The judgment is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

CONVERY, ADMINISTRATOR, v. LANGDON.

DECEDENTS' ESTATES.—Set-Off.—Maturity of.—Where a cross demand against an estate is a proper set-off to a claim in favor of the estate, the fact that it was not due at the time of the decedent's death does not deprive the holder of the benefit of the set-off, if it be due at the time it is pleaded.

SAME.—Payment of Debt by Surety, after Death of Principal.—Insolvency.—In an action by the administrator of the estate of an intestate, on an indebtedness due to the decedent from the defendant, the latter answered by way of set-off, admitting the indebtedness in suit, but alleging that he had become surety for the decedent on a promissory note executed by them, and that, after the decedent's death, he had been obliged to pay off the note, and had since recovered judgment thereon against the estate.

Held, on demurrer, that the answer is insufficient.

Held, also, that the solvency or insolvency of the estate has no bearing on the rule of law in such cases.

From the Knox Circuit Court.

H. S. Cauthorn and *J. M. Boyle*, for appellant.

H. Burns and *J. S. Pritchett*, for appellee.

NIBLACK, J.—This was an action by Jerome Convery, as administrator of the estate of Gerhard Reiter, deceased,

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against Samuel T. Langdon, for a balance alleged to be due upon a settlement of accounts.

The complaint alleged, that on the 16th day of June, 1877, there was a settlement of mutual accounts between the decedent and the defendant, and that, upon such settlement, there was found to be due to the decedent the sum of fifty-seven dollars and thirty cents, which still remained unpaid. Also, amongst other things, that the decedent had died intestate in July, 1877.

The defendant answered, admitting the indebtedness charged in the complaint, but averring that on the 10th day of April, 1877, he, at the request of the said Reiter and for his accommodation, signed a note jointly with the said Reiter, and as his, the said Reiter's, surety, payable four months after date, to the cashier of the First National Bank of Vincennes, for the sum of three hundred dollars; that on the 10th day of August, 1877, when said note became due, he, the defendant, was compelled to pay, and did pay, said note; that on the 17th day of September, 1877, he filed a claim in the Knox Circuit Court against the estate of said Reiter, for the sum of three hundred dollars, the amount paid on the note, which claim was afterward duly admitted and allowed, and judgment thereon was rendered against said estate. Wherefore the defendant demanded that so much of his said judgment as might be necessary to pay and satisfy the plaintiff's claim might be set off against it.

The defendant demurred to the defendant's answer, but the court overruled his demurrer.

The plaintiff then replied that the defendant's judgment was not a preferred claim against the decedent's estate, and that said estate was insolvent, there not being sufficient assets to pay any thing upon the class of claims to which said judgment belonged.

A demurrer was sustained to the reply, and thereupon a final judgment was rendered in favor of the defendant.

Error is assigned upon the overruling of the demurrer to the answer, and upon the sustaining of the demurrer to the reply.

It is provided by section 61 of the code, 2 R. S. 1876, p. 64, that, "When cross demands have existed between persons under such circumstances that one could be pleaded as a counter-claim or set-off to an action brought upon the other, neither can be deprived of the benefit thereof by the assignment or death of the other, and the two demands must be deemed compensated so far as they equal each other."

The provisions of this section of the code are in substantial accord with a long line of well recognized authorities on the subject of cross demands, and are but an affirmance of what we would feel it our duty to hold the law to be if there were no statute on that subject in force in this State.

To entitle a defendant therefore to plead a set-off to an action against him by an executor or administrator, his cross demand must have been an existing demand against the testator or intestate at the time of his death.

It is not necessary that the cross demand thus existing in favor of the defendant should have become due at the time of the testator's or intestate's death. It is sufficient if it become due and payable in time to be pleaded as a set-off in the same manner as if the testator or intestate had lived to bring the action. *Waterman Set-Off*, sec. 97; *Rawson v. Copland*, 3 Barb. Ch. 166.

The important and really controlling question in this case is: Did the contingent liability which Langdon incurred when he signed the note referred to in the answer, as the surety of Reiter, constitute, in any proper legal sense, an existing demand against Reiter, at the time of his death?

To this we are constrained to answer in the negative.

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In the case of *Granger v. Granger*, 6 Ohio, 35, a precisely similar question had, amongst others, to be met and decided. As to that branch of the case the court said :

“The next question propounded to us is: In a suit by an administrator, upon his intestate’s claim, can the defendant set off a demand for money paid after the death of the intestate, upon a liability entered into by the defendant, as surety for the intestate? Our judgment resolves the question in the negative. No cause of action or demand existed against the intestate, at his death. A liability only was incurred, upon which, on the contingency of the security being compelled to pay for the intestate, he would have a right of action for his indemnity. A bare possibility, that in a certain future contingent event, he would have a demand, is not a debt due from the intestate, and such claim has not the mutuality required for a set-off. Such a demand, though good against the estate, can only look to the general assets for satisfaction. To allow it to be offset, would change the course of distribution of intestate estates. The hardships expected to result from the rejection of this set-off, can have no weight with us, unless the law opens the door for their redress.”

In January, 1842, the statute of New York, then in force in relation to set-offs against actions brought by executors and administrators was as follows: “In suits brought by executors and administrators, demands existing against their testators or intestates, and belonging to the defendant at the time of their death, may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased.” In the case of *Mercein v. Smith*, 2 Hill, 210, Mercein, as defendant below, had pleaded, as a set-off against the intestate’s claim, a demand for money paid, after the intestate’s death, upon a liability incurred during the lifetime of the intestate as an accommodation endorser of his, the intestate’s, note.

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The court, after quoting the statute of New York above set out, said: "This is the only case where a set-off is allowed against the estate of the deceased in a suit brought by the personal representative, where the suit is for a debt strictly due to the plaintiff in that capacity. And it is manifest that the defendant has not brought himself within it. The demand set off had no existence at the time of the death of Mr. Smith" (the intestate), "in the sense of the statute, as it did not arise till the payment of the note."

In the same connection the court also said:

"Since 1830, the rule on this subject has been declared by statute; but the latter is simply an enactment of the law as it had been previously recognized and applied." Citing *Root v. Taylor*, 20 Johns. 137, and *Frye v. Evans*, 8 Wend. 530.

Waterman on Set-Off, section 197, says:

"It is obvious that, on principle, money paid for an intestate after his decease, upon a contract of suretyship, entered into in his behalf during his life, can not be set off against a debt due to his estate;" and quotes with approbation the cases of *Granger v. Granger*, and *Mercein v. Smith*, *supra*.

A different rule has been recognized in South Carolina, but that was under a statute essentially differing from the statutes of this State and New York, above set out.

The authorities cited as above are manifestly decisive against the validity of the set-off set up by the appellee in his answer. The court, therefore, erred in overruling the appellant's demurrer to the answer.

Much of the appellant's argument here has been based upon the theory that this court might recognize a distinction between solvent and insolvent estates in the application of the rules governing set-offs to actions by executors and administrators; but, in our opinion, the authorities

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do not, and could not properly, recognize any such distinction.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the answer, and for further proceedings.

ELDER ET UX. v. SIDWELL.

SUPREME COURT.—*Appeal on Question of Law Reserved.—Assignment of Error.—Dismissal of Appeal.*—Without an assignment of error, as in other cases, an appeal to the Supreme Court on a question of law reserved will be dismissed.

From the Parke Circuit Court.

G. W. Collings and S. D. Puett, for appellants.

PERKINS, J.—Appellee sued the appellant, to foreclose a mortgage.

Issue; trial; and decree for appellee.

Mahala Elder, one of the defendants below, appealed to this court.

The following entry was made in the circuit court:

“And now comes Mahala Elder, and gives notice to the court and parties that she will take this cause to the Supreme Court, on a reserved question of law as to the sufficiency of the complaint upon demurrer filed thereto, and the decision of the court in overruling said demurrer. And the court orders the record for the Supreme Court to embrace the complaint and the demurrer of the said Mahala,” etc.

No assignment of error has been filed or made in the Supreme Court. There should have been in this case as well as in others. 2 R. S. 1876, p. 244, sec. 568.

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We discover nothing in the record rendering such assignment unnecessary. It is the complaint in this court. The appeal must, therefore, be dismissed. Buskirk Prac. 110. See *Young v. McLane*, 8 Ind. 357; *Hollingsworth v. The State*, 8 Ind. 257; *Boswell v. The State*, 8 Ind. 499.

Dismissed, at appellant's costs.

SQUIER v. THE STATE.

CRIMINAL LAW.—*Suffering Minor to Play Billiards.—Fifteen-Ball Pool.—Variance.*—The evidence showing them to be entirely different games, though both played with billiard balls on a billiard table, proof that the defendant allowed the minor to play a game of fifteen-ball pool will not authorize a conviction on an indictment for suffering a minor to play a game of billiards.

From the Steuben Circuit Court.

J. K. Morrow, for appellant.

T. W. Woollen, Attorney General, and *G. B. Adams*, Prosecuting Attorney, for the State.

WORDEN, C. J.—This was an indictment of the appellant for suffering a minor to play at billiards.

Motion to quash overruled; trial by the court and conviction, a new trial having been refused.

Objections are made to the indictment, but no question as to its sufficiency is properly presented here. No exception appears to have been taken to the overruling of the motion to quash; no motion in arrest of judgment was made; nor is error assigned upon the overruling of such motion in arrest; nor is it assigned for error that the indictment does not state facts sufficient to constitute an offence.

We proceed to the case made by the evidence. The ap-

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pellant, as has been said, was indicted for permitting the minor to play billiards, the indictment being based upon the following statutory provision.

"Be it enacted," etc., "That if any person owning or having the care, management, or control of any billiard table, bagatelle table or pigeon hole table, shall allow, suffer or permit any minor to play billiards, bagatelle or any other game at or upon such table or tables, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall, for each game so allowed, suffered or permitted to be played, be fined in any sum not less than five dollars nor more than fifty dollars." 2 R. S. 1876, p. 484, sec. 1.

The game which the appellant suffered the minor to play was shown by the evidence to have been called "pool," or, perhaps, "fifteen-ball pool." And we think it was clearly enough shown that the game thus played is not strictly, nor in ordinary parlance, a game of billiards. The game of pool, it would seem, might be played upon the old style of billiard table having pockets, but not upon the modern pocketless tables. The game played in this case was played with fifteen balls, while billiards is played with three or four balls only.

We shall not enter into a minute description of the two games, billiards and fifteen-ball pool, as shown by the evidence, in order to show the difference between them. It is sufficient to say, that, in our opinion, the evidence shows them to be different games, each having a name which distinguishes it from the other. We can not concur with the counsel for the State, in the proposition, as we understand their brief, that the word "billiards" should be regarded as a generic term, broad enough to cover any game that may be played upon a billiard table. It seems to us that the word should be construed in its ordinary sense, as it is commonly understood, and not to include a game commonly known, not by that name, but by another. If playing

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cards were an indictable offence, a man indicted for playing whist could hardly be convicted on proof that he played euchre, though both games are played with cards.

The word billiards, as used in the indictment, is descriptive of the kind of game which the appellant is alleged to have suffered the minor to play; and the variance between the allegation in this respect and the proof is, in our opinion, fatal. *Bartender v. The State*, 51 Ind. 73.

The judgment below is reversed, and the cause remanded for further proceedings.

YANDES ET AL. v. WRIGHT.

MINES AND MINING.—*Clay and Coal.*—*Action for Damages for Sinking the Surface.*—*Negligence.*—*Conveyance.*—*Lessor and Lessee.*—The owner of the fee in certain lands, by written instrument, granted to A. "the sole right to dig, mine, use or sell clay situated on" such land "(except such clay as the" grantor "may dig for potter's use); " and also the right to dig and mine coal on the same premises. He afterward, in like manner, granted to B., in the same lands, the right "to have, hold and possess all the coal, iron, lead and all other productions," vegetable and mineral, "under the surface, except the clay and stone heretofore let to" A. The assignee of the latter, in mining immediately underneath a mine operated by an assignee of the former, failed to leave sufficient supports to the ground above him, which settled down and thus destroyed the upper mine.

Held, in an action by the owner of the upper mine, against the owner of the lower, that the latter is liable for the damages sustained by the plaintiff, and that proof of the defendant's failure to leave sufficient supports to the ground overhead sustains the allegation of negligence, charged in the complaint.

From the Clay Circuit Court.

I. M. Compton, C. Mutson, S. W. Curtis and — *Holliday*, for appellants.

G. A. Knight and *C. H. Knight*, for appellee.

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BIDDLE, J.—On the 21st day of October, 1864, David Cornwell, the lessor, granted to the appellee and George Elbreg “the sole right to dig, mine, use or sell clay situated on the” land described in the lease, “(except such clay as the first party may dig for potter’s use).” Also the right to dig and mine coal on the same premises. Elbreg assigned his interest in the grant to the appellee, by which he holds the entire right under it.

On the 31st day of August, 1865, David Cornwell granted to Elberg, Montgomery & Co. a right in the same lands “to have, hold and possess all the coal, iron, lead and all other productions, whether of a vegetable or mineral origin, under the surface, except, however, all the clay and stone heretofore let to Wright & Elbreg.” This grant was assigned by Elbreg, Montgomery & Co. to the appellants, thus giving them the entire right to the things granted, subject to the grant before made to the appellee.

Each grant run for the term of twenty-five years, and each party entered upon his premises, commenced and prosecuted his mining operations. The grant of the appellants lies about thirty feet below the grant of the appellee, in the direct line of gravitation.

The appellee, as plaintiff below, avers in his complaint, that appellants, the defendants below, without any negligence on the part of the plaintiff, so negligently, carelessly and unskilfully located and insecurely constructed a certain entry or room, underlying an entry made by plaintiff in said clay strata, and so carelessly managed and insecurely propped the same as to cause, by the said negligence, carelessness and unskilfulness, the intervening strata of rock, slate and other substances to cave and fall in, and thereby destroy and render wholly useless one of the main entrances constructed by plaintiffs, leading into said strata and veins. By reason of which, etc. Wherefore, etc.

The complaint was tested by a demurrer, alleging the

insufficiency of the facts as ground, and held by the court to be sufficient.

Answer, general denial. Trial by jury, and verdict for appellee. Judgment on the verdict, over a motion for a new trial and exception. Appeal.

The appellants present three questions for our consideration, in their brief:

1. The sufficiency of the complaint;
2. The propriety of the instructions; and,
3. The sufficiency of the evidence to sustain the verdict.

1. The complaint is sufficient, whether the law is as claimed by the appellants or as claimed by the appellee. Indeed, this point may be held as waived in the brief of the appellants.

2. The instructions: It is contended by the appellants, that if the owner of the lower mines removed his minerals in the usual and proper course of mining, without negligence or wrong on his part, in leaving the proper supports for the upper mine, he will not be liable for damages caused by the natural effect of the laws of gravitation.

The appellee insists, that if the owner of the lower mine, in removing his minerals, so weakened the support of the surface in its natural condition as to cause its subsidence, and thereby injure the upper mine, he will be liable for all damages that ensue therefrom; and that no degree of care, skill or diligence, exercised in his mining operations, will excuse him from such liability.

We need not set out the instructions complained of, for it is plain, that, if the appellants are right in their view of the law, the instructions given were erroneous, and those refused correct; but, if the appellee is right in what he

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claims to be the law, then the instructions given were proper, and those refused erroneous.

This question is carefully examined and decided in the case of *Humphries v. Brogden*, 12 Q. B. 738.

In that case, "It appeared that the company had taken the coals under the plaintiff's closes, without leaving any sufficient pillars to support the surface, whereby the closes had swagged and sunk, and had been considerably injured; but that supposing the surface and the minerals to have belonged to the same person, these operations had not been conducted carelessly or negligently or contrary to the custom of the country. The jury found that the company had worked carefully and according to the custom of the country, but without leaving sufficient pillars or supports: and a verdict was entered for the plaintiff for one hundred and ten pounds damages, with leave to enter a verdict for the defendant, if the court should be of opinion that under the circumstances the action was not maintainable."

Lord CAMPBELL, C. J., in delivering the opinion of the court, says: "We have attempted without success to obtain from the Codes and Jurists of other nations information and assistance respecting the rights and obligations of persons to whom sections of the soil, divided horizontally, belong as separate properties. This penury where the subject of servitudes is so copiously and discriminately treated, probably proceeds from the subdivisions of the surface of the land and the minerals under it into separate holdings being peculiar to England." But his lordship cites and analyzes a number of authorities which, more or less directly, support his opinion. He concludes by quoting the following extract from Erskine's *Institute of the Law of Scotland*. Book II. title 9, sec. 11, and note: "Where a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city

of Edinburgh, the proprietor of the ground floor is bound merely by the nature and condition of his property, without any * servitude, not only to bear the weight of the upper story, but to repair his own property, that it may be capable of bearing that weight. The proprietor of the ground story is obliged to uphold it for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower." His lordship then sums up the case in the following words: "For these reasons, we are all of opinion that the present action is maintainable, notwithstanding the negation of negligence in the working of the mines; and that the rule to enter a verdict for the defendant must be discharged."

We have found some English authorities, besides those cited by Lord Chief Justice CAMPBELL, in *Humphries v. Brogden*, *supra*, and some subsequently decided; and also some American authorities. The right of *surface support* is treated by Blanchard & Weeks *Leading Cases on Mines, etc.*, 616-619, wherein they lay down the common-law rule, and refer to several authorities in support of it, in the following words: "There is a *prima facie* inference at common law upon every demise of minerals or other subjacent strata, where the surface is retained by the lessor, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right to support. In the absence of express words, showing clearly that he has waived or qualified his right, the presumption is that what he retains is to be enjoyed by him *modo et forma*, and with the natural support which it possessed before the demise."

In Wood on Nuisances, sec. 194, the rule is expressed as follows: "When there is a simple conveyance of the surface, reserving the mines, with the right to enter upon the surface to work the same, and no express power given or reserved to produce a subsidence of the surface, if necessary in

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the working of the mines, the person owning the minerals is bound at his peril not to cause a subsidence of the surface, even though he can not work his mines at all without doing so; and no degree of care or skill exercised in the mining operations will shield him from liability to the owner of the surface for all damages sustained by reason of any subsidence thereof."

In deciding the case of *Jones v. Wagner*, 66 Pa. State, 429, THOMPSON, C. J., said:

"The right of supports, *ex jure naturæ*, which the owner of the soil is entitled to receive from the minerals underneath, has, within comparatively a few years, received much attention in the courts in England, and the rule deducible from the cases in all the courts, the House of Lords, Exchequer and Queen's Bench, is, that where there is no restriction or contract to the contrary, the subterranean or mining property is subservient to the surface to the extent of sufficient supports to sustain the latter, or in default, there is a liability to damages by the owners or workers of the former for any injury consequent thereon to the latter. * * * * *

"That if an owner of lands grant a lease of the minerals beneath the surface with power to work and get them in the most general terms, still the lessee must leave a reasonable support for the surface, and so conversely, where the minerals are demised and the surface is retained by the lessor, there arises a *prima facie* inference at common law, upon every such demise, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right of support.'

"These citations prove two things, viz., that the owner of a mineral estate, if the law be not controlled by the conveyance, owes a servitude to the superincumbent estate, of sufficient supports; consequently the failure to do so is negligence, and so may be declared upon."

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In the case of *Coleman v. Chadwick*, 80 Pa. State, 81, it was held that, "When the owner of the whole fee grants the minerals, reserving the surface, his grantee is entitled only to so much of the minerals as he can get without injury to the surface."

The following authorities maintain the same principle: *Horner v. Watson*, 79 Pa. State, 242; *Marvin v. The Brewster Iron Mining Co.*, 55 N. Y. 538; *Wakefield v. Duke of Buccleuch*, L. R., 4 Eq. Cas. 613; *Harris v. Ryding*, 5 M. & W. 60; *Dugdale v. Robertson*, 3 Kay & J. 695; *Bainbridge Mines & Minerals*, 485.

It should be noticed throughout the cases above cited, that the word "surface," as used in the books, means not merely the geometrical superficies without thickness, but includes whatever earth, soil or land lies above and superincumbent on the mine. Surface, therefore, includes the appellee's mine which lies above the appellants' mine and below the top surface, which still may remain undisturbed and uninjured, in the original grantor. *Humphries v. Brogden*, *supra*. See also, as to the meaning of the word "surface," 2 Abbott's Law Dictionary. Title Surface, and *Burkhardt v. Hanley*, 23 Ohio State, 558.

We have also carefully examined the cases cited by the appellants, and find none that conflicts with the above views. They all touch mainly upon the rights in flowing water, used in mining, in which only a usufruct interest can be held, and which is very different from the permanent right which may be obtained in the solid surface superincumbent upon a mine. They are, therefore, not in point.

3. As to the sufficiency of the evidence to sustain the verdict: When no more negligence need be proved than the failure to furnish supports for the superincumbent mine, we think it is abundant.

The judgment is affirmed, at the costs of the appellants.

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THOMAS v. RUDDELL.

DEMURRER TO EVIDENCE.—*When may be filed.*—Either party to an action on trial by a jury may, on conclusion of the evidence in chief of the opposite party, interpose a demurrer to the evidence, and all of the evidence then in must be considered in ruling upon the demurrer.

SAME.—*Record.*—*Supreme Court.*—Where, in such case, an appeal is taken to the Supreme Court, the record should contain all of the evidence.

SAME.—*Effect to be given to Evidence.*—In deciding upon a demurrer to evidence, the court must find against the party demurring, if, upon any reasonable construction of the evidence, the jury might have found for the opposite party, had the case gone to them for a verdict.

SAME.—*Promissory Note Payable in Bank.*—*Action by remote Endorsee after maturity.*—*Fraud inadmissible in Evidence under Plea of non est factum.*—*Negligence.*—On the trial of an action by an endorsee of a promissory note payable in bank, wherein the defendant denied the execution of the note under oath, the evidence established that the defendant, intending merely to accept an appointment as an agent to sell a certain article, and having the ability to read, executed the note in suit, reading "Six months after date, or before if made out of" the sale of such article, etc., believing the same to read "Six months after date, if made out of the sale of" such article, as the same was read to him. The note showed endorsements by the payee and another in blank and not dated, but the endorsement to the plaintiff bore date after the maturity of the note.

Held, on demurrer by the plaintiff to the evidence, that he was entitled to recover.

Held, also, that mere fraud in the execution of the note was not admissible in evidence under the plea of *non est factum*.

From the Cass Circuit Court.

D. P. Baldwin and *D. D. Dykeman*, for appellant.

S. T. McConnell and *W. W. Woollen, Jr.*, for appellee.

PERKINS, J.—Suit by appellee, against appellant, upon a promissory note.

Answer, *non est factum*.

Evidence heard by a jury; the plaintiff demurred to the evidence; the court required the defendant to join in the demurrer, and discharged the jury. See, as to this practice, *Strough v. Gear*, 48 Ind. 100; *Holmes v. The Phoenix, etc., Ins. Co.*, 49 Ind. 356; *Lindley v. Kelley*, 42 Ind. 294.

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The record contains all the evidence. This is as it should be. 3 Bl. Com. 372; Buskirk Prac. 178.

When the plaintiff had closed his evidence in chief, and rested, the defendant might then have demurred to the evidence. Gould Pl., chap. 9, sec. 52. But, when either party demurs to the evidence, his demurrer must be ruled upon, according to the practice in this State, in view of all the evidence which has been given in the cause at the time the demurrer is filed.

The following is a copy of the note sued on :

“ \$210.

GALVESTON, Cass County,

“ State of Indiana, Jan. 22d, 1873.

“ Six months after date (or before if made out of the sale of R. R. Fenner’s Improved Stubble and Sub-Soil Plow) I promise to pay to R. R. Fenner & Co., or order, two hundred and ten dollars, payable at the Citizens National Bank of Indianapolis, Indiana, for value received, with use, without any relief from valuation or appraisement laws. If suit shall be instituted to force the payment thereof, I agree to pay a reasonable attorney’s fee. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note.

ABRAHAM THOMAS.”

The note passed by assignment to the plaintiff. It does not appear to have been negotiated at bank. It was past due when assigned to the plaintiff. It had passed through other hands; but there is no evidence showing the circumstances surrounding, nor the considerations for, such previous transfers, nor the dates at which they were made.

The following is a copy of the endorsements :

“ R. R. FENNER & Co.

“ S. REA.

“ Oct. 15, 1873. For value received, I assign my interest in the within note to J. H. Ruddell, without recourse.

“ W. W. WOOLLEN, JR.”

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The testimony is lengthy, and need not be set out fully in this opinion.

Abraham Thomas was the first witness. He testified to the facts touching the contract and the execution of the note. His testimony will be more fully stated, farther on in this opinion.

The next witness was John Thomas, whose testimony was relative to the execution of the note.

H. D. Thornton testified touching a reasonable attorney's fee. J. M. Justice did the same. T. J. Tuley did the same.

As to the execution of the note and the contract, a large portion of the testimony tended to prove fraud in obtaining the contract upon which the note was given, but this portion may have been irrelevant to the issue in the cause.

In *Edwards v. Brown*, 1 Tyrw. 182, BAYLEY, B., in delivering the opinion of the court, said :

"The first question therefore is, whether fraud can be given in evidence on *non est factum*? and I am of opinion it can not. I agree that whatever shews that the bond never was the defendant's deed, may be given in evidence on the plea of *non est factum*; but if a party actually executes, being competent to execute at the time, and was not deceived as to the actual contents of the bond, though he might be misled as to its legal effect, and though he might have been entitled to avoid the bond by stating on the record that he was so misled, he is not at liberty on the plea of *non est factum* to say that it never became by execution his deed."

In *Nebeker v. Cutsinger*, 48 Ind. 436, this is said, on page 445 :

"In the case of *Cline v. Guthrie*, 42 Ind. 227-236, the law, as applicable to cases like the present, is stated in the following terms :

"It is well settled by authority and on principle, that

the party whose signature to a paper is obtained by fraud as to the character of the paper itself, who is ignorant of such character, and has no intention of signing it, and who is guilty of no negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included.'

"To this proposition several authorities are cited, which will be noticed hereafter. We see no reason to change the statement of the law as thus made."

We re-state here a few additional rules of law, touching negotiable or commercial paper, as being pertinent to the question of *bona fides*.

1. "The purchaser of commercial paper from an innocent holder for value, may recover on it, though he may know when he takes the paper, of defences to it." *Haskell v. Whitmore*, 19 Me. 102; *Smith v. Hiscock*, 14 Me. 449; *Hereth v. The Merchants National Bank*, 34 Ind. 880.

2. Where the endorsement of a note is without date, it is presumed, nothing appearing to the contrary, to have been made at the date of the note. *Snyder v. Oatman*, 16 Ind. 265.

3. It is settled law in this State, that where the maker of a promissory note governed by the law merchant is induced by the fraud of the payee to sign his name thereto, he is liable to a *bona fide* endorsee for value, if he was guilty of any negligence in failing to inform himself of the contents of the note; but he may not be liable to the original payee, or his assignee, who acquires the paper after the same has become due. A *non-bona fide* holder might not be able to recover where a *bona fide* holder might recover. *Cline v. Guthrie*, 42 Ind. 227; *Nebeker v. Cutsinger*, 48 Ind. 436; *Hereth v. The Merchants National Bank*, *supra*.

4. Commercial paper is presumed, the contrary not

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appearing, to have been transferred by endorsement, upon a consideration. 1 Parsons Con. 265, note.

In the case at bar, the plaintiff acquired the note some months after it became due, but from prior endorsees who may have been *bona fide* holders.

It is manifest from what has been said, that it is necessary now to examine that part of the testimony touching the signing of the note in suit by the defendant; for the case turns upon this point. The signature may have been obtained in such a manner that the apparent maker of the note will not be liable even to a *bona fide* holder. *Nebeker v. Cutsinger, supra*. The testimony shows that the defendant was a carpenter, a man fifty-seven years of age, a resident of Duck Creek township, Cass County, Indiana; that just as he "was finishing up his work" at night, two men, strangers, called at his shop, and wanted to sell him a five years' agency for the sale of "R. R. Fenner's Improved Stubble and Sub-Soil Plow." While at his shop they took out their papers for him to read, among them the note in question. He had not his glasses with him, told the men so, and that he could hardly see to read without them; that they could read their own writing better than he could, and to read the note. One of them read it, telling him, before commencing, that he would have nothing to pay if he did not make it out of the sale of the plows. He read the note thus: "Six months after date, if made out of the sale of R. R. Fenner's Improved Stubble and Sub-Soil Plow, I promise to pay," etc. Believing the note to be drawn as read to him, Thomas, the maker, signed it.

This testimony as to the signing of the note is in no manner contradicted, but rather corroborated, and it makes a case, if believed, exactly within that of *Edwards v. Brown, supra*. At least the jury, had the case been left to it for decision, might so have viewed it.

The rule of decision by which the court should have

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been governed in rendering judgment upon the demurrer of the plaintiff to the evidence was this, viz.: If the jury, had the case gone to it, might have found, upon any reasonable construction of the evidence, in favor of the defendant, the court was bound to find for the defendant. The court was bound to do for the defendant all that a jury might reasonably have done for him. *Andrews v. Hammond*, 8 Blackf. 540. "By a demurrer to evidence, all the facts of which there is any evidence are admitted." *Andrews v. Hammond*, *supra*, note; *Griggs v. Seeley*, 8 Ind. 264.

Upon consideration of the evidence in the cause, we feel constrained, in the light of the authorities, to come to the conclusion that the defendant below was guilty of negligence in signing the note as he did, and that the judgment against him was correct. *Woollen v. Ulrich*, 64 Ind. 120; *Maxwell v. Morehart*, *ante*, p. 301.

The judgment is affirmed, with costs.

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CRIMINAL LAW.—Evidence.—New Trial.—Waiver.—Error in the admission of evidence is waived by a failure to assign the same as cause for a new trial.

SAME.—Forgery of Promissory Note.—Variance.—Alteration.—An indictment for forgery of a promissory note set out a copy of a note purporting to be the joint and several note of the defendant and the person whose name was alleged to have been forged thereto, dated "Aug. 23d, 1878," payable six months after date with ten per cent. interest, and containing the stipulation, "If paid before maturity ten per cent. interest to be deducted from the face of this note, from time of payment until due." On the margin of both the note and the copy were the words "May pay Oct. 20th, '78." The evidence showed that those words were added by the payee, in pencil, after the delivery of the note, for his own convenience, and as a memorandum of the time at which the defendant stated he would probably pay off the note.

Held, that the addition was immaterial, and that it was proper to so instruct the jury.

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SAME.—*Instruction modified.*—*Intent inferred from previous Crime.*—There having been evidence on the trial of such cause, that the note in suit had been given for the purchase price of a certain chattel, and that the defendant had, immediately previous to the forgery charged, forged but destroyed a promissory note on a third person for the same purchase price, the defendant asked the court to instruct the jury to disregard the evidence as to the previous forgery, but the court, in giving the same, modified it by adding that such previous forgery, "if proved beyond a reasonable doubt, may be taken into consideration for the purpose of showing guilty intent" in the forgery charged in the indictment.

Held, that the modification was proper.

From the Allen Criminal Circuit Court.

H. Colerick, R. S. Taylor and S. L. Morris, for appellant.

T. W. Woollen, Attorney General, and *S. M. Hench*, Prosecuting Attorney, for the State.

NIBLACK, J.—This was a prosecution against Morris Robinson, for forging the name of Diamond King to a promissory note.

The note was set out in the indictment, as follows :

"\$96. SHELDON, IND., August 23d, 1878.

"Six months after date, we, or either of us, promise to pay to the order of Andrew J. Taylor ninety-six dollars, payable at Fort Wayne National Bank, Fort Wayne, Ind. Value received, with exchange on New York, and attorney's fees at ten per cent., without any relief whatever from valuation, appraisement, stay or exemption laws, with interest annually at ten per cent. until due, and ten per cent. after due. The drawers and endorsers severally waive presentment for payment, protest, and notice of non-payment. No interest from date, if paid at maturity. If paid before maturity, ten per cent. interest to be deducted from the face of this note from time of payment until due, date of this note.

"P. O. Po, MORRIS ROBINSON. [Seal.]

"Allen County. DIAMOND KING. [Seal.]

"No. ——. Due Feb. 23d, 1879.

"May pay Oct. 20th, '78."

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The jury trying the cause returned a verdict of guilty, assessing a fine of fifty dollars, and fixing the imprisonment at two-years in the state-prison, and, over a motion for a new trial, a judgment of conviction followed upon the verdict.

Several errors are assigned here upon the proceedings below, but only one is so assigned as to raise any question in this court, and that one is upon the overruling of the appellant's motion for a new trial. All the others fall under the general head of causes for a new trial merely, and consequently do not constitute proper assignments of error. *Buskirk Prac.* 126, 127; *Bridgewater v. Bridgewater*, 62 Ind. 82; *Myers v. Murphy*, 60 Ind. 282; *Houston v. Bruner*, 59 Ind. 25; *Compton v. Crone*, 58 Ind. 106; *Grant v. Westfall*, 57 Ind. 121.

Andrew J. Taylor, the payee of the note, testified upon the trial, that he wrote the words, "May pay Oct. 20th, '78," on the margin of the note for his own convenience, after the note was executed and delivered to him, such words having reference to the time at which the appellant said he expected to be able to take up the note.

The appellant objected to the introduction of the note in evidence against him, upon the ground that this evidence of Taylor showed a material variance between the note executed and delivered to Taylor and the note set out in the indictment. The note was, nevertheless, admitted in evidence over the appellant's objection.

That ruling was not, however, assigned as a cause for a new trial, and for that reason the appellant's exception to it has been waived. *Sharpe v. O'Brien*, 39 Ind. 501.

The court upon its own motion instructed the jury, in substance, that if they found that the note introduced in evidence was due at a different time, and payable upon different terms, from the note described in the indictment, such a variance was material, and would acquit the de-

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fendant, and added, "But if you find from the evidence in the case, that the words 'May pay Oct. 20th, '78,' were written on the margin of the note described in the indictment in pencil mark by Andrew J. Taylor, at the time and place stated by him in his evidence, and although these words are set out in the indictment, you will not be authorized to find that there is a material variance between the note and the indictment. However, you are the judges of the law as well as the facts in this case; and if you find that the words 'May pay Oct. 20th, '78,' are a material part of the note set out in the indictment, you should acquit the defendant."

The appellant contends that so much of this instruction as expressed the opinion that the alleged variance was immaterial, provided it appeared that Taylor had written the words, "May pay Oct. 20th, '78," on the margin of the note, as stated by him, was erroneous.

We can not see that the appellant has any cause to complain of this instruction.

We think that by its terms the note set out in the indictment might have been paid at any time before its maturity, and hence might have been paid on the 20th day of October, 1878. The addition, therefore, of the memorandum that it might be paid on that day, whether made before or after the execution of the note, appears to us neither to have added any thing to, nor to have subtracted any thing from, the terms or stipulations of the note as set out in the indictment, and to have constituted an immaterial variance in any view in which the case was presented to the jury.

There was also evidence tending to show that the note set out in the indictment was executed for the alleged purpose of securing the payment of the price of a buggy sold by Taylor to the appellant at a public sale, on a credit of six months, and that the appellant had previous-

ly attempted to forge, or had caused to be forged, the name of one Jacob Keefer, to a note similar to the one set out in the indictment, for the same alleged purpose, but that the appellant had been induced to destroy the note to which Keefer's name was attached, before getting up the note upon which this prosecution was based.

Touching that branch of the evidence the appellant asked the court to instruct the jury as follows :

“ Any evidence, if any, before you in this case, showing or tending to show any former unlawful acts or forgeries by this defendant, should not be considered by you for the purpose of showing the guilty intent of the defendant in this case.” This instruction was given by the court but with the following modification : “ But the forgery of any other note connected with the purchase of the wagon by the defendant of Andrew J. Taylor, if proved beyond a reasonable doubt, may be taken into consideration for the purpose of showing such guilty intent.” To which modification the appellant excepted.

The appellant asked the court to further instruct the jury, that “ If there is in this case any evidence tending to show that the defendant, at any other time, was charged with, or had committed, any other forgery, it is your duty not to consider it as evidence tending to show, or showing, that the defendant committed the offence charged in the indictment in this case.”

The court also gave this instruction, but with a modification, substantially, if not precisely, in the same language as the modification to the previous instruction above set out. To this modification the appellant also excepted.

The appellant further contends, that the court erred in the modifications it thus made to both the instructions asked by him as above set forth, and that the action of the court in that respect can not be sustained, either upon principle or authority.

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But we see no objection to the modifications complained of. They limited the evidence of previous unlawful acts or forgeries to matters connected with the same transaction to which the note set out in the indictment related. Thus limiting the evidence, we are unable to perceive that these modifications violated any well established rule of evidence, or that they did the appellant any injury or injustice. *Harding v. The State*, 54 Ind. 359.

No sufficient cause has been shown for a reversal of the judgment.

The judgment is affirmed, at the appellant's costs.

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SHERIFF'S SALE.—*Action to Vacate, and for Purchase-Money.—Sale to Wife, on Husband's Bid.—False Representations by Sheriff.—Sale without Memorandum.—Principal and Agent.—Ratification.*—In an action against the sheriff and judgment creditor, to vacate a sheriff's sale, and to recover money paid thereon, the complaint alleged that theretofore, in selling certain real estate on a decree of foreclosure in favor of his codefendant, the sheriff, on a bid made on behalf of the plaintiff by her husband, had sold the real estate to the plaintiff, without her knowledge or consent; that the husband had no authority to act as her agent; that no memorandum of the sale had been made; that afterward, in order to induce the plaintiff to ratify the sale, the sheriff had falsely represented to her that the premises sold included certain valuable improvements; and that the plaintiff, relying on such representations, agreed to accept the sale, and paid to the sheriff part of the purchase-money bid.

Held, on demurrer, that the complaint is sufficient.

SAME.—*Witness.*—Under the act of March 11th, 1867, 2 R. S. 1876, p. 132, "defining who shall be competent witnesses," etc., the plaintiff's husband was not a competent witness in her behalf, in such action.

SAME.—*Defective Verdict.—Amendment of, by Court.—Damages.*—There being no contest in such action as to the amount paid by the plaintiff, and the jury having simply found a general verdict "for the plaintiff," it was proper for the court, on motion, to supply the defect in the verdict by assessing the damages at the amount so paid.

From the Franklin Circuit Court.

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F. S. Swift and W. H. Bracken, for appellants.

J. F. McKee, F. Berry and H. Berry, Jr., for appellee.

PERKINS, J.—Frank A. Waltz and Mary M. Waltz, his wife, executed to Henry Grotenkemper a mortgage on a piece of land in Franklin county, Ind., on which was a distillery.

Said Frank A. Waltz departed this life, leaving heirs. His widow, Mary M. Waltz, was appointed his administratrix. Said mortgage became due, and was not paid. It was foreclosed and the property mortgaged was sold upon the decree of foreclosure, on the 6th day of April, 1875, by John L. Case, sheriff of said Franklin county, to John Colter, as agent for his wife, Isabella Colter, for whom he assumed to act. He was not in fact her agent.

The complaint alleges that afterward, "on the 10th day of April, 1875, the defendant, said sheriff Case, for the purpose of inducing the plaintiff, said Isabella Colter, to accept the acts of said John Colter, and thus ratify the same, represented to her that the hog-pens situate south-west, and other valuable improvements and buildings south, of the still-house sold, which were used with and apparently a part of said establishment, were included in said sale; that said pens and improvements constituted a large item of the value; that she had no knowledge on the subject, but, relying on said representations, promised to take said property, and paid said sheriff, on said bid of five thousand dollars by her said husband, the sum of five hundred dollars; that said representations were untrue," etc.; and she asks judgment for the five hundred dollars paid, etc. It was also averred in the complaint, that no written memorandum of the sale was made, etc.

The complaint contained a second paragraph for money had and received, etc.

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Demurrers to the paragraphs of complaint were overruled.

Sheriff Case answered in two paragraphs :

1. The general denial ;
2. An affirmative paragraph amounting to the general denial, to which a demurrer was sustained.

Grotenkemper was made a party. After a demurrer by him to the complaint was overruled, he answered "by way of a cross complaint."

Reply in denial.

Jury trial ; verdict for the plaintiff as follows :

" We, the jury, find for the plaintiff.

" JOHN DORE, Foreman."

On motion, the court supplied the defect in the verdict, by assessing the damages at five hundred dollars.

The court overruled a motion for a new trial ; also a motion in arrest of judgment.

The overruling and sustaining of demurrers, the overruling of the motions for a new trial and in arrest, and the assessment of the damages by the court, are assigned as errors.

1. The court did not err in its rulings upon demurrers ;

2. As to the assessment of damages by the court.

The amount of damages was not contested. A receipt for the five hundred dollars showed the amount paid the sheriff. The question of liability to repay that sum was the point contested. In such a case the judgment will not be reversed because the court assessed the damages. *Medler v. Hiatt*, 14 Ind. 405.

3. As to the representations of the sheriff touching the property, we quote from *Mulks v. Allen*, 12 Wend. 253. That was a motion to set aside a sheriff's sale. SAVAGE, C. J., said :

" In *Lansing v. Quackenbush*, 5 Cow. 38, this court re-

fused to correct the endorsement on the execution, when property had been sold which did not belong to the defendant, because a court of equity was deemed a more proper forum to grant relief; and in *Vandenburg v. Briggs*, 7 Cow. 367, we refused to correct a mistake of the plaintiff's agent on the ground that junior judgment creditors had acquired rights; but in *The Ontario Bank v. Lansing*, 2 Wend. 260, we vacated a sale where the plaintiffs had inadvertently bid a sum less than the amount intended to have been bid. This is a stronger case in favor of such a motion than either of the cases above referred to. Whether the defendant did or did not intend to mislead the plaintiffs' executors and the deputy, there is no doubt that they were deceived by the representations he made." The motion was sustained.

Under the code, a sale will be set aside where it would have been, either at law or in equity, prior to the code. The setting aside a sheriff's sale is made in the discretion of the court. This case may be decided by the rules governing sales in such cases. Two grounds were alleged as rendering the sale, at least, voidable:

1. The want of a memorandum in writing;
2. The misrepresentations of the sheriff to appellee.

Waiving the question as to the existence of the first ground, the second was established. Mrs. Colter, as a witness, swore to them. Other witnesses testified to the admissions of sheriff Case that he made them, and he did not deny the making of them, as a witness on the trial, but only testified that he did not recollect, and thought he did not make them. *Reed v. Diven*, 7 Ind. 189, is in point. See, also, *Gregg v. Strange*, 8 Ind. 366; *Pennington v. Clifton*, 10 Ind. 172; and *Scarry v. Eldridge*, 63 Ind. 44. If the contract were regarded as made by the sheriff as a private person, the representations were sufficient to avoid it.

1. One of the grounds of the motion for a new trial

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was the admission of Mr. Colter, the husband of the appellee, as a witness on the trial of the cause, over the objection of the opposite party. He testified to material facts. He was not a party to the suit and had no interest in the subject-matter of it.

The statute in force at the time enacted that husband and wife should not be witnesses "as to matters for or against each other, or as to communications made to each during marriage, except" in cases of assault and battery. 2 R. S. 1876, p. 182. Under this statute the admission of said witness to give such testimony was error. This is a matter regulated by positive statute. See *Scarry v. Eldridge, supra*; *Haskit v. Elliott*, 58 Ind. 493.

The statute of 1879 is different on this point. It enacts that "husband and wife as to communications made to each other during marriage shall not, in any case, be competent witnesses, unless with the consent of the party making such confidential communications: *Provided*, That in suits by the husband for the seduction of the wife, the wife shall not be a competent witness." Acts 1879, p. 245.

The judgment is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

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137	298
66	340
143	178

HIGHWAY.—Location and Change of.—Successive Remonstrances.—Public Utility.—Damages.—Estoppel.—Whenever any one is aggrieved by a proposed location, opening or change of a highway, he may, under section 19, 1 R. S. 1876, p. 532, at any time before final action therein by the board of commissioners, set forth his grievances by way of remonstrance, and obtain an assessment of his damages in the mode prescribed by law; and the fact that his remonstrance was first directed solely to the public utility of the proposed location or change of highway, and that reviewers appointed on such remonstrance have made a report that such location

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or change is of public utility, does not estop such aggrieved person from afterward presenting his claim for damages, by way of remonstrance on that ground, at any time before final action by the board.

SAME.—*Appeal to Circuit Court.—Trial de novo.*—On appeal from the board of commissioners to the circuit court, in cases concerning the location, vacation or change of highways, there must be a trial *de novo* of the whole case.

From the Tippecanoe Circuit Court.

G. O. Behm, J. Park and A. O. Behm, for appellants.

R. P. Davidson and J. C. Davidson, for appellees.

Howk, J.—In this case the appellees presented their petition, in writing, to the Board of Commissioners of Tippecanoe county, praying for a certain change in a certain highway, in said county. Viewers were appointed by the board of commissioners to view the proposed change of highway, and to make report as to its public utility; and these viewers subsequently made their report, in writing, in favor of the proposed change of the highway and of its "public utility." This report was accepted, and the viewers were discharged, and thereupon all the appellants, except William D. Dubes, appeared and filed their written remonstrance against the opening and change of said highway, upon the ground that the same would not be of "public utility." Upon the filing of this remonstrance, reviewers were appointed by the board to review the proposed change of highway, and afterward these reviewers made their report, in writing, in favor of the proposed change and of its public utility.

All the appellants, including said William D. Dubes, then presented to the board of commissioners their written application for the appointment of reviewers to assess their respective damages occasioned by the proposed change of said highway. Thereupon the appellees moved the board of commissioners to reject the appellants' application for damages on account of the proposed change of said highway, upon the ground that the appellants had

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theretofore filed their objections, in writing and by way of remonstrance, against the opening of said proposed change of highway, which remonstrance had been duly acted upon by the board by the appointment of reviewers, who had made their report thereon. The board of commissioners sustained the appellees' motion, and rejected the appellants' application for the appointment of reviewers to assess their respective damages as aforesaid, and the board finally ordered that the report of the reviewers be adopted, and that the highway be changed, located and established, as described in said report. From this final order of the board of commissioners, the remonstrants appealed to the court below.

In the circuit court, the appellants re-filed their remonstrance, praying for the appointment of reviewers to assess their respective damages occasioned by the proposed change of highway, which remonstrance had been rejected by the board of commissioners. Thereupon the appellees moved the court to strike out said remonstrance and to dismiss the appeal. The court sustained the appellees' motion to strike out the remonstrance, to which decision the appellants excepted and filed their bill of exceptions. The motion to dismiss the appeal was overruled. The cause was tried by a jury, and a general verdict was returned for the appellees, that the proposed change of highway, as prayed for in the petition of the appellees, would be of "public utility." Upon the return of the verdict, the record proceeds as follows: "And the defendants now move the court to set aside the general finding of the jury in this behalf, and grant them a new trial of this cause, and have time till the first day of the next term of this court to file their reasons in support of said motion." Without action of any kind on this motion, the cause was continued until the next term; and on the first day of said term the appellants, over the appellees' objections, were allowed by the court to file their written motion for a new trial.

Afterward, at the same term, the appellees moved the court in writing to reject the appellants' motion and reasons for a new trial, upon the ground that the same were not filed at the term of the court at which the verdict was returned; which motion was sustained by the court, and to this decision the appellants excepted and filed their bills of exceptions. The appellants' motion in arrest of judgment was then overruled by the court, and their exception was duly entered to this decision.

Afterward, at the same term of the court, the appellees moved the court in writing to correct an alleged error in the general verdict of the jury, which motion was sustained, and to this ruling the appellants excepted. Judgment was then rendered by the court, upon the general verdict of the jury as corrected; and from this judgment this appeal is now here prosecuted.

In this court, the appellants have assigned, as errors, the following decisions of the court below:

1. In striking out and rejecting the appellants' claim for damages;
2. In striking out the appellants' motion for a new trial;
3. In overruling their motion in arrest of judgment; and,
4. In amending the verdict of the jury, after they had been discharged, and after the term at which the verdict was returned.

The most important question for decision in this case, as it seems to us, arises under the first alleged error, the striking out and rejecting of the appellants' claim for damages. It will be seen from our statement of this case, that this claim for damages was first rejected by the board of commissioners. It is necessary, therefore, we think, that we should first consider and decide, whether or not the board of commissioners was authorized by law to strike

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out and reject the appellants' claim for damages. For, if this decision of the board was unauthorized and erroneous, then the appellants' only remedy for such decision was an appeal to the circuit court, and the renewal there of their claim for the assessment of their damages. In these highway cases, the law is well settled, that there must be a trial *de novo* of the whole case, on an appeal from the board of commissioners to the circuit court. *Sidener v. Essex*, 22 Ind. 201; *Hays v. Parrish*, 52 Ind. 132; and *Scraper v. Pipes*, 59 Ind. 158.

The first question for our decision, therefore, under the first alleged error, may be thus stated: Did the board of commissioners err in sustaining the appellees' motion to reject the application of all the appellants for damages on account of the proposed change of highway, upon the ground that all the appellants, except the said William D. Dubes, had theretofore filed their objections, in writing and by way of remonstrance, to the opening of said proposed change of highway, for the reason that the change was of no public utility, which remonstrance had been acted upon by the appointment of reviewers, who had made their report thereon to the board?

It seems to us that this question must be answered in the affirmative.

In section 19 of "An act to provide for the opening, vacating and change of highways," approved June 17th, 1852, it is provided as follows:

"SEC. 19. If any person, through whose land such highway or change may pass, shall feel aggrieved thereby, such person may at any time before final action of the board thereon, set forth such grievances by way of remonstrance, and the said board shall thereupon appoint three disinterested freeholders, as reviewers, and assign a day and place for them to meet." 1 R. S. 1876, p. 532.

In this case, it is not claimed by the appellees, that the

appellants did not file their application for damages, and set forth therein their grievances by way of remonstrance, before the final action of the board of commissioners on the appellees' petition. But the appellees claim, as we understand their position, that because the appellants, except said William D. Dubes, had first filed their remonstrance against the proposed change of highway, upon the ground that the same was not of "public utility," and because reviewers had been appointed on this remonstrance, and had made a "favorable" report as to the "public utility" of such proposed change of highway, therefore, and by reason of the proceedings thus had, all the appellants, the said Dubes included, were thereby and thereafter estopped and precluded from setting forth their grievances by way of remonstrance, and asserting therein any claim for the damages resulting to them, or either of them, from the proposed change of highway, although such remonstrance was presented and filed "before final action of the board" on the appellees' petition. It was upon this ground that the board of commissioners rejected the appellants' remonstrance or application for damages in this case, and that the court below afterward struck out and rejected the same claim, which had been re-filed therein.

We suppose that these decisions of the board of commissioners, and of the circuit court, were founded, to some extent, upon the same construction of a single clause or sentence of section 24 of the highway act of June 17th, 1852. In section 23 of said act, it is provided, that if any one or more freeholders, residing in the county along the proposed highway, etc., should object to the same, "at any time before final action thereon," as not being of "public utility," other viewers might be appointed, etc., who should report whether or not, in their opinion, the said highway, etc., would be of public utility. In section 24, after stating what action may be taken if a majority

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of the viewers should report against the public utility of the highway, etc., it is provided as follows: "But if they report favorable thereto, the objector shall pay the costs of the reviewers, and the highway shall be recorded and ordered to be opened and kept in repair." 1 R. S. 1876, p. 538.

It would seem that both the board and the court below construed this section as if it made a favorable report, as to the "public utility" of the proposed change of highway, final and conclusive, not only as to that question, but also as to the rights of the remonstrants aggrieved by such proposed change, to compensation for the damages occasioned thereby. We can not concur in this construction of the provisions of the statute. It seems to us, that whenever any one is aggrieved by the location, opening or change of a highway, he may, in the language of the statute, "at any time before final action of the board thereon," set forth his grievances by way of remonstrance, and obtain an assessment of his damages, if any, in the mode prescribed by law. We do not and can not think that such person will be, or ought to be, debarred of his right to a just compensation in damages, or estopped from asserting such right, by the simple fact that he first asked that the "public utility" of the proposed highway, or change of highway, should be first investigated and determined. We do not believe that a party waives his right to compensation in damages for grievances occasioned by a proposed highway, or change of highway, by insisting in the first instance that the same is not of "public utility," and asking that this question may be first determined; for, if it is shown that the proposed highway, or change of highway, is not of public utility, it will not be established, "unless the petitioners will open and maintain the same at their own expense," and in that event, of course, the damages would be settled by contract, and not by law.

The question of the "public utility" of a proposed highway or change of highway, in so far as the remonstrants against it are concerned, naturally precedes the question of damages; for, if the viewers should make report against the public utility of the proposed highway, or change, then there would be no occasion for an assessment of damages.

In the case of *Butterworth v. Bartlett*, 50 Ind. 537, it was held by this court, that a party aggrieved by a proposed highway, or change of highway, might remonstrate against the same, upon the ground that it was of no public utility, and at the same time, in the same remonstrance, assert his claim for damages, occasioned by such proposed highway or change. There is no provision in the highway act, which, in terms, authorizes the uniting of such inconsistent claims in one and the same pleading; but it seems to us that the technical rules of pleading are inapplicable to the proceedings had before a county board in highway cases. If the appellants had, in the case at bar, united in their remonstrance their objection to the proposed change of highway upon the ground that it was of no public utility, and their claim for the damages occasioned by such change, we would not have held such remonstrance bad or insufficient. While, under the authority of the case cited, the inutility of the proposed change of highway, and the claim for the damages occasioned thereby, might have been united in one and the same remonstrance, yet it does not follow that they must have been so united, in order to constitute a good remonstrance. Nor does it follow, either logically or legally, as it seems to us, that because the appellants first remonstrated against the proposed change of highway, solely upon the ground that it was of no public utility, they thereby waived the right, in the event that question should be found against them, to present and in-

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sist upon their claim for damages, at any time before the final action of the board on the appellee's petition. The appellants had the right, as we construe the statute, to defeat the appellees' petition by showing, if they could, that the proposed change of highway was of no public utility; but, if they failed in this showing, we think they well might, at any time before the final action of the board, present and insist upon their claim to damages, by way of a remonstrance on that ground. We are clearly of the opinion, therefore, that both the board of commissioners and the circuit court erred in striking out and rejecting the appellants' claim for damages, in this case.

Other questions have been presented and discussed by counsel, arising under the other alleged errors. But as the conclusions we have reached will reverse the judgment, and probably lead to a new trial, and as those questions relate to matters which may not occur on another trial, we deem it unnecessary for us to extend this opinion with the consideration and decision of those questions.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to overrule the appellees' motion to strike out and reject the appellants' remonstrance or claim for damages, and for further proceedings in accordance with this opinion.

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DELANO v. THE STATE.

CRIMINAL LAW.—Prostitute.—Affidavit and Information.—Under section 5 of the act of 1877, Acts 1877, Spec. Sess., p. 80, defining the offence of being a prostitute, it is necessary to the sufficiency of an affidavit and information charging such offence, that they charge the defendant with the commission of acts constituting such offence.

From the Jackson Circuit Court.

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J. B. Brown, for appellant.

T. W. Woollen, Attorney General, and *F. L. Prow*, Prosecuting Attorney, for the State.

PERKINS, J.—Margaret Hattabaugh made an affidavit before the clerk of the Jackson Circuit Court, that, "As she is informed and believes, on or about the 8th day of December, 1878, at and within Jackson county and State of Indiana, Electa Delano was then and there a female prostitute, contrary to the form of the statute," etc.

On this affidavit, the prosecuting attorney, Fred. L. Prow, filed the following information:

"Fred. L. Prow, prosecuting attorney within and for the Forty-Second Judicial Circuit of the State of Indiana, now gives the court here to understand and be informed, that on the 8th day of December, 1878, at and within the county of Jackson and State of Indiana, Electa Delano was then and there a female prostitute. Wherefore he prays for a warrant," etc.

"FRED. L. PROW, Prosecuting Attorney."

By her counsel said Delano moved to quash the affidavit and information. The motion was overruled, and the defendant was tried by the court, convicted, and fined five dollars and costs, etc. Appeal to this court.

The appellant was prosecuted under the 5th section of the vagrant act of 1877, Acts of the special session of that year, p. 80, which reads thus:

"SEC. 5. Any female, who shall so conduct herself as to be recognized and known as a courtesan, or shall frequent or live in houses of ill-fame, or associate with women of bad character for chastity, or at a house where men of bad character frequent or visit, or is known to be guilty of fornication for hire, shall be deemed and known as a female prostitute."

This section contains the definition of the offence.

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Crimes generally consist of acts done, in some cases, in particular states of mind. In this case, the offence, if it existed, must have consisted of acts done or suffered. And the general rule of criminal pleading is, that the acts constituting the crime, in a given case, must be set forth in the pleading charging it, with a reasonable degree of certainty. Bicknell Crim. Prac., p. 83. "As to the description of the offence, it is, in general, sufficient to describe the offence, in the language of the statute defining it." Bicknell, *supra*; Moore's Crim. Law, p. 228.

It is needless to discuss this case. Neither the affidavit nor information contains any description of the offence. They were bad. The information should have been quashed. It is not a case where pleading so general as simply naming the crime charged is justified.

A question is raised as to the jurisdiction of the circuit court. It is claimed that the prosecution should have been instituted before a justice of the peace or a mayor. But we need not examine this question in the present case.

The judgment is reversed, and cause remanded to be dismissed.

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DUGGINS v. THE STATE.

CRIMINAL LAW.—*Change of Venue.*—*Bias of Judge.*—*Discretion of Court.*—*Practice.*—A defendant in a criminal prosecution is entitled to one, and only one, change of judge on account of his bias or prejudice; and the court has no discretion to refuse it.

SAME.—*Special Judge.*—*Failure to perfect Change of Venue from.*—When, in such case, a change of judge is ordered by a special judge, but is not perfected, and no judge to try the cause is either appointed or called, and the defendant is recognized to appear at the next term of court, at which the regular judge presides, it is error to refuse an application by the defend-

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ant, upon a sufficient affidavit, for a change of venue from such regular judge.

From the Harrison Circuit Court.

B. P. Douglass, S. M. Stockslager, W. N. Tracewell and J. R. Tracewell, for appellant.

T. W. Woollen, Attorney General, and *W. T. Zenor*, Prosecuting Attorney, for the State.

WORDEN, C. J.—The appellant was indicted in the court below, jointly with two others, for the crime of arson, and was separately tried and convicted.

He appeals to this court, and assigns several supposed errors in the proceedings, one of which only we deem it necessary to consider.

The indictment was found while the Hon. Thomas C. Slaughter was judge of the court.

At the September term of the court, 1878, on account of the sickness of Judge Slaughter, the Hon. William A. Porter was regularly appointed to hold the residue of the term after the appointment, and this cause, as to the appellant, was continued until the next term of the court.

At the next term of the court, November, 1878, Judge Slaughter still being unable from sickness to attend, Mr. Porter was again regularly appointed to hold that term of the court.

At that term of the court the appellant, on a proper affidavit filed, as to the prejudice of Judge Porter, moved for a change of the judge, and the record proceeds to state the action of the court, as follows:

“And the court having seen and examined said affidavit, it is ordered by the court, that a change of judge herein, as to said Americus Duggins, be granted. And the defendant, Americus Duggins, is ordered by the court to enter into a recognizance in the sum of one thousand dollars for his appearance in this court on the first day of the next term thereof.”

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The recognizance was accordingly entered into, but no appointment of a judge was made, or further notice taken of the cause, at that term of the court.

At the February term, 1879, of the court, the Hon. George W. Denbo presided, he having succeeded Judge Slaughter in the office of judge of that circuit, the latter having died; and the subsequent proceedings in the cause were had before Judge Denbo.

At the last above mentioned term of the court, the appellant was put upon trial, but the jury, being unable to agree, were discharged by consent of the parties, without rendering a verdict.

The cause was finally set down for trial on April 14th, 1879, at an adjourned term of the court. Before entering upon the second trial the appellant moved for a change of judge on the ground of the bias and prejudice of Judge Denbo against him, his motion being based upon a sufficient affidavit; but the motion was overruled, for the reason, as a bill of exceptions informs us, that the defendant had had one change of judge on the same ground. The appellant excepted, and the trial proceeded, resulting in a conviction as first herein stated.

A defendant in a criminal prosecution is entitled to only one change of judge on account of bias or prejudice against him. *Line v. The State*, 51 Ind. 172.

But he is entitled, upon a proper affidavit, to one change on that ground, and the court has no discretion to refuse it. *Manly v. The State*, 52 Ind. 215.

Has the appellant in this case had a change of judge on the ground of bias or prejudice? This question, it seems to us, must be answered in the negative. To be sure, Judge Porter, while holding the court, on the application being made to him, ordered that a change of judge be granted, and continued the cause. He neither appointed nor called any judge to try the cause.

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When Judge Denbo came into the office of judge he found the case upon the docket, and it became his right and duty to try it by virtue of his office, and not by virtue of any appointment or call made upon him in consequence of the change ordered. The change of judge was ordered, though not perfected, and the appellant was required to recognize for his appearance at the next term of the court, when the cause came before Judge Denbo in precisely the same manner that it would if no change had been ordered.

We are of opinion that the court erred in refusing the change applied for.

The judgment below is reversed, and the cause remanded for a new trial.

NOTE.—The clerk will give the proper notice for the return of the prisoner.

LOCKE ET AL. v. THE MERCHANTS NATIONAL BANK.

PLEADING.—Practice.—Common Law.—Demurrer.—Motion.—Where the defects in a complaint are such as, at common law, could have been reached only by special demurrer, they can be reached, under the code, only by motion, and such complaint is good on demurrer.

SAME.—Exhibit.—Foundation of Action.—Promissory Note.—In a suit by a banking corporation, against the proprietors of a private bank, to recover damages sustained by the former through the neglect of the latter to perform their duty in the collection of a note payable at the latter bank, the note is not the foundation of the action, and a copy thereof attached to the complaint as an exhibit forms no part of the complaint.

SAME.—Plea in Bar.—Bankruptcy.—Mitigation of Damages.—In such case, a paragraph of answer, admitting the deposit of the note for collection and a failure to protest the same, but alleging the subsequent bankruptcy of the maker of the note, a composition by him with his creditors, without

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63	353
131	325
66	353
135	451
66	353
141	549
66	353
144	606
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160	518
66	353
164	435

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receiving a discharge, and his then ownership of valuable property, constituted no bar to the plaintiff's cause of action; and the facts alleged were available, if at all, only in mitigation of damages.

SAME.—*Existence of Bank put in Issue by General Denial.*—An answer of general denial in such case puts in issue the existence of the bank mentioned in the note.

SAME.—*Harmless Error.*—It is a harmless error to sustain a demurrer to a paragraph of answer, when the facts alleged therein could be and were given in evidence under other paragraphs of such answer.

SAME.—*Waiver, by Trial without Issue.—Judgment on Pleadings.*—Where a defendant goes to trial without an issue on his answer, he waives issue and is not entitled to a judgment on the pleadings for the want of a denial or avoidance of such matters.

SPECIAL VERDICT.—*Venire de Novo.*—The facts involved in the finding of a special verdict are evidentiary and inferential. It is the duty of the jury to consider the evidentiary facts, but to find the inferential facts; and if the special verdict shows upon its face that the jury found the evidentiary facts, but not the inferential, the verdict is ill, because it shows that the jury ought to have found other facts, namely, the inferential. The jury should not find the evidence but the facts, that is, the inferential facts.

SAME.—*Failure of Bank to give Notice of Non-Payment of Note Payable in Bank.*—When the proprietors of a bank are sued for failing to give notice of the dishonor of a note left with them for collection, and the material issue in the cause is as to whether due notice was given to the plaintiff of the dishonor of such note, a special verdict, which does not find that due notice was given, or facts from which the court can pass upon it as a question of law, is not sufficient to enable the court to render judgment upon it, and a *venire facias de novo* should be granted.

SAME.—*Abbreviation.—Evidence.*—A promissory note "payable at Citiz. Bank, Noblesville, Ind.," is a note payable at "Citizens Bank," etc., and if the jury might have so found upon it, such note was admissible in evidence in such case.

From the Hamilton Circuit Court.

A. F. Shirts, G. Shirts, D. Moss and T. J. Kane, for appellants.

J. W. Evans and R. R. Stephenson, for appellee.

PERKINS, J.—This was an action, known at common law as an action on the case, by the appellee against the appellants, to recover from the latter damages sustained by the former, through the neglect of the latter to discharge their

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obligations in the collection of a note, of which the following is a copy :

“ \$200. NOBLESVILLE, Ind., Dec. 20th, 1875.

“ Thirty days after date, I promise to pay to the order of Fuller, Childs & Co., two hundred dollars, value received, without any relief from valuation or appraisement laws of the State of Indiana, with interest at ten per cent. per annum from date until paid. If this note be collected by suit, the judgment shall include the reasonable fee for plaintiff's attorney. Payable at Citiz. Bank, Noblesville, Ind.

R. H. DAVIDSON.”

Endorsed : “ FULLER, CHILDS & Co.”

The complaint alleges that the note was payable at the Citizens Bank, Noblesville, Indiana, a private bank, owned and managed by the appellants, Locke and Bonebrake ; that it was endorsed before due, to the appellee, The Merchants National Bank, of Toledo, Ohio, and was transmitted by that bank, before due, to said Citizens Bank of Noblesville, for demand, protest and notice, etc., which said latter bank neglected to cause to be done ; that it failed to notify the plaintiff, appellee, or any of the endorsers of said note ; whereby the appellee lost, etc.

Demurrer to the complaint, for want of sufficient facts, overruled, and exception entered.

Answer in five paragraphs. Demurrers to the third and fifth sustained, and exceptions entered.

The remaining paragraphs were :

1. General denial.

2. And for a second paragraph, defendants say they admit the deposit with them for collection of the said note ; that they did not protest the same ; but they say that heretofore, to wit, on the 7th day of February, 1876 ; Richard H. Davidson, the maker of said note, filed his voluntary petition in bankruptcy, in the District Court of the United States for the district of Indiana ; that after-

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ward, on the 14th day of March, 1876, said Davidson filed in said court his written proposal for a composition with his creditors, in pursuance of section 5103 of the bankrupt law, and that such proceedings were had thereon that, on the 23d day of May, 1876, said proposed composition was confirmed, and no discharge was ever granted to said Davidson; that the plaintiff never filed said claim in the bankrupt court, and never accepted the provisions of said composition, and that said Davidson is now the owner of real estate of the value of two thousand dollars, etc.

The fourth paragraph is not materially different from the second.

Reply to the second and fourth paragraphs of answer: "That the plaintiff," appellee, "is a foreign corporation, doing business in the city of Toledo, Ohio; that the endorsers on the note, Fuller, Childs & Co., are also residents of said city of Toledo, and are solvent and responsible; that, by the failure and negligence of the defendants in giving said endorsers or the plaintiff due or legal notice of the non-payment of the note, they have thereby deprived the plaintiff of all legal recourse against endorsers," etc.

The defendants filed a motion as follows:

"The defendants move the court for a judgment in their favor on the pleadings, for the reason that the second and fourth paragraphs of answer are composed wholly of material allegations of new matter, which are not specifically controverted by the reply."

Motion overruled; exception; trial by jury.

No general, but the following special, verdict was returned, viz.:

"We, the jury, return the following special verdict in the above cause:

"1. We find that the note, a correct copy of which is filed with the complaint, was executed by R. H. Davidson to Fuller, Childs & Co., of Toledo, Ohio, and was payable at the Citizens Bank, Noblesville, Indiana.

"2. That, before the maturity of said note, said Fuller, Childs & Co., for a full and valuable consideration, transferred the same to the plaintiff, by their endorsement in writing on the back thereof.

"3. After purchasing said note, the plaintiff, on the thirteenth day of January, 1876, sent the same to the defendants, who were the proprietors of the Citizens Bank, for collection.

"4. Defendants received it before maturity, and, as plaintiff's agents, demanded payment of said R. H. Davidson; said Davidson failed to pay it.

"5. Defendants and Davidson live in the town of Noblesville, Indiana, and the plaintiff and said Fuller, Childs & Co. reside and do business in the city of Toledo, State of Ohio.

"6. The defendants, after said Davidson failed to pay said note, failed and omitted to send said Fuller, Childs & Co. any notice of the non-payment of said note, and failed to have the same protested for non-payment.

"7. That the plaintiff, after receiving said note, immediately demanded payment of the same from said Fuller, Childs & Co., who were and have been solvent for more than two years last past.

"8. That said Fuller, Childs & Co. refused to pay said note for the reason that they had received no notice of the non-payment of said note, and were, therefore, no longer liable on their endorsement of the same.

"9. That the amount now due on said note to the plaintiff is \$221.48-100, principal and interest.

"10. That on the 7th day of February, 1876, said Davidson filed his voluntary petition in bankruptcy, and, on the 23d day of May following, effected a composition with his creditors, which composition was duly approved by the bankrupt court, by the terms of which he was to pay his said creditors fifty cents on the dollar in full of their claims.

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"11. That the plaintiff and said Fuller, Childs & Co. had notice of said composition proceedings.

"12. That the defendants received said note for collection, and recognized the same as payable at their said bank

"13. That no part of said note has been paid by any one.

"14. That, on the 29th day of January, the plaintiff received a letter from the defendants, inclosing said note which was the first notice the plaintiff had of the non-payment of said note.

"15. If, upon the foregoing facts, the law is for the plaintiff, we find for the plaintiff and assess his damages at two hundred and twenty-one dollars and forty-eight cents.

"16. If the law is with the defendants, then we find for the defendants."

The defendants moved for a *venire de novo* for the reasons:

"1. That said verdict does not purport to contain all the material facts given in evidence or proven on the trial of said cause;

"2. That said verdict does not show that other material facts, not returned in it, were not proven on said trial;

"3. That said verdict does not embrace, nor purport to embrace, findings on all the issues in said cause;

"4. That said verdict does not embrace a finding of the time the defendants placed the note mentioned in the complaint, and notice of its non-payment, in a properly sealed envelope, in the post-office of said town of Noblesville, for transmission to the plaintiff by due course of mail;

"5. That the said verdict does not embrace a finding upon the issues joined on the second paragraph of the defendants' answer; and,

"6. That the said verdict does not embrace a finding upon the issues joined upon the fourth paragraph of the defendants' answer."

The motion was overruled and exception reserved.

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A motion for a new trial followed, on account of errors alleged to have occurred at the trial, and because the verdict was contrary to law and unsustained by the evidence; which motion was overruled.

The defendants then moved for judgment in their favor, on the special findings, but the motion was overruled, and they excepted; and thereupon the court rendered judgment, "That the plaintiff recover of the defendants the sum of one hundred and ten dollars and seventy-four cents, the one-half of the sum found by the jury to be due to the plaintiff," etc. See, as to this judgment, *Bowles v. Stord*, 60 Ind. 267.

Appeal by the defendants to the Supreme Court.

The assignment of errors is as follows:

"1. The court erred in overruling the demurrer to the complaint;

"2. The court erred in sustaining the demurrer to the third paragraph of the answer;

"3. The court erred in overruling appellants' motion for judgment in their favor on the pleadings;

"4. The court erred in overruling the motion for a *venire de novo*;

"5. The court erred in overruling the motion for a new trial;

"6. The court erred in overruling appellants' motion for judgment in their favor on the verdict of the jury;

"7. The court erred in rendering judgment for the appellee and against the appellants, on the special verdict of the jury; and,

"8. The court erred in its decision in rendering judgment on the special verdict of the jury."

We consider the alleged errors assigned in the order of their assignment.

1. The complaint was sufficient on demurrer. If it had any defects, they were such as, at common law, would not

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have been reached by general, but only by special, demurrer; and, under the code, such defects are reached only by motion. *Sibbitt v. Stryker*, 62 Ind. 41.

The complaint was not upon the note, and making a copy of the note an exhibit did not make it a part of the complaint. *Schori v. Stephens*, 62 Ind. 441.

2. If the court erred in sustaining the demurrer to the third paragraph of answer, which we do not decide, the error was a harmless one, as the matter of that paragraph, so far as well pleaded, could have been, and was, given in evidence under other paragraphs of the answer. *The Toledo, etc., R. W. Co. v. Craft*, 62 Ind. 390.

The plaintiff, under the general denial, was bound to prove the existence of the bank mentioned in the note. The paragraph did not allege the time of mailing the letter returning the note. The demurrer was several to the paragraphs of answer. *Cain v. Hunt*, 41 Ind. 466.

3. The defendant was not entitled to judgment on the pleadings. The second and fourth paragraphs of the answer were neither of them a bar to the cause of action. They alleged matters in mitigation of damages only, if they were available for that—a point we do not decide. Matter in mitigation could have been given in evidence under the general denial. *Stewart v. Muse*, 62 Ind. 385.

Had the paragraphs of answer contained matters constituting a bar to the action, it would have been incumbent on the plaintiff, at common law, to have denied or avoided them. If he did neither, the defendants might have been entitled to judgment on the pleadings. *Stephen Plead.*, Tyler's ed., 126-7; *Cox v. Vickers*, 35 Ind. 27; *Train v. Gridley*, 36 Ind. 241; 2 R. S. 1876, p. 186, sec. 372. But in this State going to trial without an issue is held a waiver.

A *venire de novo* is not provided for in the code of practice. *Shaw v. The Merchants National Bank*, 60 Ind.

83. *Witham v. Earl of Derby*, 1 Wils. 48, is the leading case touching this writ at common law. Lord Chief Justice WILLES, in the opinion of the court, in that case, says :

The writ "can only be granted in one or other of these two cases ; as 1st, if it appear upon the face of the verdict, that the verdict is so imperfect that no judgment can be given upon it ; 2ly, where it appears that the jury ought to have found other facts differently, and it can not be granted in any other case ; the best way of explaining these rules, will be by instances, and I will mention two, upon the head of imperfect verdicts ; *The Mayor and Corporation of Shrewsbury v. Corbett Kinaston*, about six years ago : that was a *mandamus*, whereupon there were pleadings to issue, a special verdict was found, and error brought, and it was insisted that neither upon the verdict, nor judgment, was there any damages taken, and therefore that it was so imperfect that a *ve. fa. de novo* must be awarded ; the next instance was *Chalie v. Haswell* in February or March, 1740, which was a prosecution for selling wine by retail, and upon the first opening it was found there must be a *ve. fa. de novo*, because of the imperfection of the verdict, the act of Parliament it was founded upon having particularly mentioned retail measure, as quart, gallon, etc., and the verdict only found that he sold wine by bottles, without taking any notice of the measures in the statute, which was so imperfect, that the court could not give any judgment upon it, for nobody could pretend to say of what measure the bottles were : as to the second head, where it appears upon the face of the record itself, that the jury ought to have found otherwise ; I will likewise mention two instances, indeed not of so high authority as the other cases, but such as are undeniable ; the first is in an action of trover ; if the jury find a special verdict that the goods were demanded of the de-

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fendant by the plaintiff, and defendant refused to deliver them, a *ve. fa. de novo* ought to go, because the jury have found only the evidence of a fact, which they ought to have determined, for demand and refusal are only evidence of a conversion, and they ought to have found a conversion. The second instance upon this head is, the case of the *Corporation of Maidstone* about the year 1738 or 1739, in B. R.; there the jury found the evidence of a fact, which shewed they ought to have found the fact itself."

It thus appears that the facts involved in the finding of a special verdict are divided into two classes—evidentiary facts and inferential facts; that it is the duty of the jury to consider the evidentiary facts, but to find the inferential facts; and if the special verdict shows upon its face that the jury found the evidentiary, but not the inferential facts, the verdict is ill, because it shows that the jury ought to have found other facts, viz., the inferential.

It has often been decided by this court that the jury should not find the evidence, but the facts;—by which is meant the inferential facts.

Tested by the foregoing rules, the special verdict in the case at bar was obnoxious to both the objections stated by Lord Chief Justice WILLES.

We will not extend this opinion, by definitely pointing out but one. We will observe that this court, in practice, may not always have adhered rigidly to the rules laid down in *Witham v. Earl of Derby*, *supra*, though we claim to follow the English practice.

In *Whitworth v. Ballard*, 56 Ind. 279, it is said: "When a verdict, either general or special, is imperfect by reason of some defect, uncertainty or ambiguity upon the face of the record, or by not finding upon all the issues, or by not assessing damages, the proper motion is for a *venire facias de novo*." Our cases are cited. See, also, *Anderson v. Donnell*, *ante*, p. 150.

In this case, the proprietors of the Citizens Bank of Noblesville, Indiana, were sued on account of their failing to give notice of the dishonor of a note left with them for collection. And the question arises, to whom and how should notice have been given? In 1 Daniel on Negotiable Instruments, p. 246, sec. 831, it is said :

“ Sometimes a bank holding indorsed paper for collection sends notice in the event of its dishonor to the indorser from whom it was received. Sometimes it sends notices not only to him, but also to the drawers and to all the indorsers, addressed to their post-offices, or delivered at their places of business, respectively. Sometimes it encloses notices for all the parties entitled thereto under one envelope in company with notice to the last indorser, that he may thus be conveniently supplied with the means of transmitting notice to the successive indorsers, and to the drawer antecedent to him, if such there be. But how far the duty of the bank extends in this regard, and what it must do to discharge itself of liability is a question upon which opinion has divided. The weight of authority, however, is strongly to the effect, and the law may be assumed to be, that it is only necessary for the bank to notify its immediate predecessor, that is, the party from whom it received the paper, no matter what may be the nature of the title or interest of that party to or in it. But special circumstances may vary this general principle. Thus an agreement between the bank and its principal may vary it. So also may a usage of the collecting bank.”

Authorities are cited sustaining the propositions asserted.

As to the mode of transmitting notice, Byles on Bills, 6th ed., side p. 277, says :

“ Putting a letter into the post is the most common and the safest mode of giving notice. It is not necessary to prove that the letter was received, and any miscarriage will not prejudice the party giving notice.”

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Protest was not important in this case. Demand and notice sufficed. 2 Daniel Negotiable Instruments, sec. 926; Byles Bills, 256.

One of the issues in the cause, and the material one, was whether the appellants gave due notice to the appellee of the dishonor of the note in question in this suit. Without a finding on that issue, the court could not render judgment on the special verdict. The jury found that the appellee received a letter conveying the dishonored note to them, on the 29th day of January. That was an evidentiary fact, tending to prove that before that time the appellants had written the letter, but it did not show when the letter was mailed, nor its contents; and we have seen, that, if the appellants mailed a properly drafted letter in due time, that constituted notice, whether it was ever received or not by the appellee. The jury did not find the fact of due notice given, or otherwise, nor facts from which the court could pass upon it as a question of law. The special verdict was not sufficient to enable the court to render judgment upon it. The *ve. fa. de novo* should have been issued. See *The Gazette Printing Co. v. Morss*, 60 Ind. 153.

One other question is made, which, as it will arise upon another trial, we deem it proper to decide, and that is this: Is the note set forth in the complaint a commercial note? that is, does it appear to be payable at a certain existing bank? It seems to us that the abbreviation "Citz." plainly means Citizens, and that the note appeared to be payable at the existing Citizens Bank of Noblesville, Indiana. If the jury might so have found upon it, then it seems to us it was admissible in evidence.

In *Miller v. Powers*, 16 Ind. 410, it was decided that the court, sitting as a jury, might infer from the face of a note payable "at the Br. at Fort Wayne of the Bk. of the State of Indiana," that it was intended to be made pay-

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able "at the Branch at Fort Wayne of the Bank of the State of Indiana." See *Parkinson v. Finch*, 45 Ind. 122.

It is not necessary that we should notice any other question in the cause.

The judgment is reversed, with costs, and the cause is remanded for further proceedings in accordance with this opinion.

OVER v. HETHERINGTON.

PARTNERSHIP.—Set-off.—Promissory Note.—Fraud.—Negligence.—Pleading.

—In a suit upon a promissory note not payable in bank, the defendant answered that himself, B. and C. were partners; that B. and defendant bought out C.'s interest in the concern, each to pay one-half of the amount agreed upon; that the note in suit was executed by defendant to C., in discharge of his half; that when C. retired from the firm he was indebted to it in a certain sum, on his individual account, which indebtedness C. had fraudulently concealed from defendant; that defendant subsequently bought out B. and became thereby the owner of the entire claim against C. and asked that such claim be allowed as a set-off against the note.

Held, that such claim does not constitute a set off. When a partner sells his "interest in the concern," it must be presumed that he sells only his legal interest in the firm; and it can not be assumed, in the absence of any stipulation to that effect, that such partner sold or intended to sell his indebtedness to the firm.

Held, also, that, when a party relies upon fraud as a ground for relief, facts showing the fraud must be alleged.

Held, also, that it will be assumed that C.'s indebtedness to the firm appeared upon its books, and that such books were open to the examination of the defendant, and his alleged ignorance of the existence of such indebtedness was the result of his own inexcusable negligence.

From the Marion Superior Court.

H. Dailey and *W. N. Pickerill*, for appellant.

Hawk, J.—This was a suit by the appellee, against

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the appellant, on a promissory note, not payable in a bank in this State, executed by the appellant to the order of one Frederick Berner, and endorsed by him to the appellee.

The appellant answered in four paragraphs, of which the first was a general denial of the complaint, and in each of the other three paragraphs he set up substantially the same facts;—by way of set-off, in the second paragraph, and as a failure of the consideration of the note, in the third and fourth paragraphs of said answer.

To each of the second, third and fourth paragraphs of the answer, the appellee demurred upon the ground that it did not state facts sufficient to constitute a defence to his action; which demurrers were sustained by the court at special term, and to these rulings the appellant excepted.

The trial of the cause by the court at special term resulted in a finding and judgment for the appellee, in the full amount due on the note; and on appeal this judgment was affirmed by the court in general term.

In this court, the appellant has assigned, as error, the judgment of affirmance of the court below in general term; and this error brings before us the errors assigned by the appellant on his appeal to the general term. These latter errors were, that the court at special term, had erred in sustaining the appellee's demurrers to the second, third and fourth paragraphs of the appellant's answer. As before stated, each of these paragraphs stated substantially the same facts as the others, as constituting the appellant's defence to this action. We give the following summary of the facts stated and relied upon by the appellant, in the affirmative paragraphs of his answer, as constituting his defence to this action, from the brief of his counsel, on file in this court:

“ Frederick Berner, Joseph K. English and Ewald Over,

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the appellant, were partners in the machine and foundry business, at the city of Indianapolis. On the 17th day of October, 1873, English and Over bought out Berner's interest in the concern for \$8,000, each arranging to pay one-half of the \$8,000, or \$4,000, which arrangement Berner accepted. The note upon which this action is founded is one that Over gave Berner in discharge of the \$4,000 he had arranged to pay. The answer alleges that English kept the books of the concern, that Berner managed the details of the business, and that Over had nothing to do with it except to furnish one-third of the capital and share the profits and losses. The answer also alleges, that, when Berner retired from the firm, he was indebted to it in the sum of \$295.25, on his own individual account, of which indebtedness Over, the appellant, was ignorant at the time he went into the arrangement to purchase Berner's interest; that Berner fraudulently concealed this debt from Over, and to cover it up, after he had retired from the firm, induced the book-keeper of the concern to enter up the sum of \$295.25 to the individual stock account of each member of the old firm of Berner, English & Over. The answer further alleges, that, by reason of this concealment on the part of Berner and Over's ignorance of the \$295.25 indebtedness, Over was induced to pay money and execute notes to Berner to the amount of \$4,000; whereas, had he known the actual facts of the case, he would have required Berner to account to him for his share of the \$295.25. The answer further informs the court, that Over subsequently bought out English, and thereby became the owner of the entire claim against Berner, and the note in suit being non-bankable, the answer asks that the \$295.25 be allowed as a set-off against the note."

The question presented for decision, and discussed by the appellant's counsel in their brief of this cause, is stated by them in these terms:

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“ Was the alleged indebtedness of the partner, Berner, a proper subject of set-off, in Over’s favor, in a suit against him on this note, or, rather, was the account a debt at all ? ”

We have no brief in this court, from the appellee or his counsel, and we are therefore indebted to the brief of the appellant’s attorneys for our only information in regard to the grounds of the decision of the court below.

On behalf of the appellant, it is conceded by his counsel, that the case of *Hasselman v. Douglass*, 52 Ind. 252, is in point on the question for decision, in the case now before us, and that it was held by the court below to be decisive of that question, against the appellant. We are asked to overrule the case cited ; and our attention is specially directed to certain points of difference which, the appellant’s counsel claim, exist between that case and the case at bar. The facts of the two cases are very similar. In the case cited, where a partner who was indebted to the firm, of which he was a member, sold his interest in the copartnership to a third person, taking the purchaser’s notes for a part of the purchase-money, in an action on those notes by such partner against the purchaser, it was held by this court, that, in the absence of fraud or of a warranty as to the interest of such partner, his said sale did not transfer his said debt to the firm, as a part of its assets, to the said purchaser, and that such debt would not constitute either a set-off or counter-claim in favor of the purchaser, in such action on said notes.

It seems to us, that, upon the facts of the case cited, the conclusion reached by the majority of this court, as then constituted, was clearly right, and we must decline to overrule it. The interest of a partner, in the partnership property of his firm, is his share of what may be left of such property after the payment of the debts of the firm, and after the deduction therefrom of his indebtedness, if any,

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to his firm. For his copartners have a specific lien on his share of the assets of the partnership, to secure his indebtedness to the firm; and, in the ascertainment of his interest in the property of the firm, his indebtedness thereto must be taken into the account and settled out of his share. *Smith v. Evans*, 37 Ind. 526; *Donellan v. Hardy*, 57 Ind. 393.

When, therefore, as in this case, a partner makes a sale of his "interest in the concern," it must be presumed, we think, that he sells only his legal interest in the firm, and nothing more. It can not be assumed, in such case, in the absence of any stipulation to that effect, that such partner sold, or intended to sell, if he could, his own indebtedness to the firm, or any part thereof. But it was alleged by the appellant, that Berner fraudulently concealed his indebtedness to the firm, and that the appellant was ignorant of such indebtedness at the time of his purchase of Berner's interest. The appellant failed to allege what fraudulent acts were done by Berner, in the concealment of his debt to the firm. It is well settled by the decisions of this court, that, when a party relies upon fraud as a ground for relief, it is not enough for him to "characterize the transaction as fraudulent by the simple use of that word. It is the office of a pleading to allege facts, not legal conclusions." *Curry v. Keyser*, 80 Ind. 214. *Darnell v. Rowland*, 30 Ind. 342; *Ham v. Greve*, 34 Ind. 18; and *Joest v. Williams*, 42 Ind. 565.

The appellant did not claim that Berner kept the accounts of the firm. On the contrary, he alleged that English kept the books of the concern. He did not claim that Berner's indebtedness to the firm was not charged against him on the books of the firm; nor did the appellant allege that he did not have free access at all times to the firm's books. If the indebtedness of Berner to the firm appeared on its books, as we may assume that it did, in the absence

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of any averment to the contrary, and if the firm's books were open at all times to the examination of the appellant, as we may assume they were, in the absence of an averment to the contrary, then it would seem that the appellant's alleged ignorance of the existence of Berner's indebtedness was the result of his own negligence, and inexcusable, and could not be pleaded by him as affording any ground of defence.

Upon the whole case we do not think that the court in general term committed any error in affirming the judgment of the special term.

The judgment is affirmed, at the appellant's costs.

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CRIMINAL LAW.—*Supreme Court.*—*Defective Record.*—*Practice.*—The Supreme Court will not pass upon any proceeding when some essential part thereof is omitted from the record.

SAME.—*Postponement.*—*Affidavit.*—*Bill of Exceptions.*—*Record.*—Where an affidavit, which purports to be the one upon which a motion to postpone the trial of a criminal cause was founded, is simply copied into the record by the clerk without any order of court and not as a part of any bill of exceptions, it is improperly in the record, and in legal contemplation does not constitute any part thereof, and no question as to its sufficiency is presented.

From the Clark Circuit Court.

C. H. Test, J. Coburn and E. E. Bassett, for appellant.

T. W. Woollen, Attorney General, for the State.

NIBLACK, J.—The appellant, William Kennedy, was indicted jointly with Alfred Applegate and William Stanley, for the murder of George Chamberlain. The indictment charged the murder to have been in the first degree. The appellant has been three times separately tried upon that indictment.

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Upon the first trial he was found guilty of murder in the first degree, and his punishment fixed at death. A new trial being granted, a second trial resulted in a conviction for murder in the second degree, and a sentence of imprisonment in the state-prison for life. From that judgment there was an appeal to this court, where the judgment was reversed, and the cause remanded for a new trial. *Kennedy v. The State*, 53 Ind. 542.

After the cause was thus remanded, the appellant pleaded specially his acquittal of the charge of murder in the first degree upon the second trial. To this there was a replication, a rejoinder and a sur-rejoinder, upon all of which various questions were raised, but none of these pleadings are in the record.

The appellant, having also entered a plea of not guilty to the indictment, then, as is shown by certain record entries of the clerk and by a paper purporting to be an affidavit copied into the record, filed his affidavit showing that on the 3d day of November, 1871, he was convicted in the Shelby Circuit Court upon an indictment for assault and battery with intent to commit murder, and sentenced to eight years' imprisonment in the state-prison south, and that his term of imprisonment had not then expired; that ever since his conviction upon said indictment in the Shelby Circuit Court, as aforesaid, he had been confined as a convict in said state-prison south, and that he was then only temporarily absent from such prison by order of the court below, to answer this indictment, and liable to be remanded to said prison at any time.

Upon his affidavit thus filed, the appellant moved the court to postpone the trial of this cause until his then existing term of imprisonment should have expired, but the court overruled this motion to postpone the trial, to which the appellant excepted, and tendered, and had signed, his bill of exceptions, reserving his exception to the overruling.

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of said motion. That bill of exceptions is also not in the record. A jury was then empanelled to try the cause. The appellant thereupon, for written reasons filed, moved the court to discharge the jury, but that motion was also overruled. These written reasons are also not in the record.

Upon the trial, the court gave certain instructions and refused to give certain others, to all of which the appellant excepted, and tendered, and had signed, his bill of exceptions, reserving his exceptions upon such instructions, but this bill of exceptions is also not in the record.

The jury found the appellant guilty of murder in the first degree upon this third trial, and fixed his punishment at imprisonment in the state-prison during life.

Upon written causes filed, the appellant moved the court for a new trial, and that motion was likewise overruled. These written causes are also not in the record. Judgment then followed upon the verdict.

Hon. John S. Davis, the presiding judge of the 4th Judicial Circuit, being disqualified to try this cause, this last trial was had before Hon. Simeon K. Wolfe, a practising attorney of Floyd county, as special judge.

Errors are assigned upon the appointment of the said Wolfe as special judge, and upon all the subsequent proceedings in the cause in which rulings were made adversely to the appellant.

A certiorari was issued by this court, to the clerk of the court below, commanding him to supply certified copies of all the papers above referred to as not in the record, and he has answered that those papers are missing from the files in his office, and that in consequence he is wholly unable to supply copies of the same.

No valid objection to the appointment of the Hon. Simeon K. Wolfe, as special judge, has been pointed out, and none has been made apparent to us from an examination of the record.

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Owing to the emasculated, and consequently defective, condition of the record, the remaining errors assigned upon it present no question for our consideration, or upon which we are enabled to express any opinion. We can not undertake to pass upon the correctness of any proceeding, when some essential part of that proceeding is omitted from the record. But it is earnestly insisted by the appellant that there is enough in the record to show that the court erred in its refusal to postpone the trial of the cause until after his term of imprisonment in the state-prison, upon which he was then confined as a convict, should expire.

The affidavit, however, purporting to be the one upon which the motion to so postpone the trial was founded is simply copied into the record by the clerk without any order of court, and not as part of any bill of exceptions. This affidavit is therefore improperly in the record, and in legal contemplation does not constitute any part of the record. There is consequently nothing before us upon which we can rightfully review the action of the court below, refusing to postpone the trial as complained of by the appellant.

We very much regret our inability to have brought before us a complete copy of the proceedings below, but we are in that respect without authority to do more than we have done.

The judgment is affirmed, at the costs of the appellant.

Petition for a rehearing overruled.

BOLING, ADMINISTRATOR, v. MCCLELLAND ET AL.

WILL.—Construction of.—Personal Property devised absolutely.—Life-Estate. Direction to Executor to Sell.—A testator, by his will, devised to his wife

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certain real estate for her life; and the will then continued: "And, as to my personal estate, I direct as follows: First. To my wife I bequeath certain personal property, which is described. "And I also order and decree, that all my property, both personal and real, *belonging* to my estate at the death of my beloved wife, provided that she outlives me, shall be sold by my executor, * * * and that said estate shall be equally distributed among my legal heirs." The wife outlived the testator.

Held, that the will gave to the wife absolutely the specific personal property mentioned.

Held, also, that the word "belonging" has reference to the time of the death of the testator's wife; and the direction to sell embraces such property only as might then belong to the testator's estate. This would not include the property specifically bequeathed to his wife.

From the Washington Circuit Court.

H. Heffren and *J. A. Zaring*, for appellant.

D. M. Alsbaugh and *J. C. Lawler*, for appellees.

WORDEN, C. J.—James Dickson, deceased, left the following will:

"I, James Dickson, of Washington county, in the State of Indiana, make and publish this my last will and testament: First. I direct that my body be decently interred, and that my funeral be conducted in a manner corresponding with my estate and situation in life; and as to my worldly estate I dispose of the same in the following manner, to wit:

"First. I direct that all my funeral expenses first be paid; and, secondly, that all my just debts be paid out of my personal estate, as soon after my decease as possible. I also will and bequeath to my wife, Jane Dickson, my entire real estate, where I now live, in the town of Canton, to hold the same to her own use and benefit, during her natural lifetime; and as to my personal estate, I direct as follows: First. To my wife I bequeath my roan mare (known by the name of Jenny Lind), and also my buggy and buggy harness; also my cow, and also all my household and kitchen furniture, with all my sale notes that are due the 15th day of October, 1868; also all

the notes now held by me against William Miller, executed on the 17th day of October, 1867, one of them drawn for five hundred dollars, due in four years, and the other for five hundred dollars, due in five years. And I also order and decree, that all my property, both personal and real, belonging to my estate at the death of my beloved wife, provided that she outlives me, shall be sold by my executor, either at public or private sale, as he, in his judgment, may think best at the time, and that said estate shall be equally distributed among my legal heirs."

Then follows the nomination of an executor and the usual conclusion of a will.

James Dickson, the testator, died in 1869, and Jane, his wife, in 1879.

Without stating how the question arose, it will be sufficient to set out the following agreement of the parties as to the point to be decided :

"It was further agreed that the question to be decided herein was, whether the last will and testament of James Dickson gave the personal property specifically mentioned in the will to said Jane Dickson for life, or whether it was a specific bequest to her absolutely. And it was further agreed, that if said will gave only a life-estate to said property to Jane Dickson, there should be a finding and judgment for the plaintiff, but that if it was an unconditional and absolute bequest to said Jane Dickson of the personal property therein mentioned, then there should be a finding and judgment for the defendants."

There was a finding and judgment for the defendants, and the plaintiff has appealed and presented the question for the decision of this court.

We are of opinion that the will gave to Jane Dickson the specific personal property mentioned absolutely, and not for life merely.

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The testator first devised to her a life-estate in the real property mentioned. Then he bequeathed to her the specific personal property mentioned, without restriction or limitation. The circumstance that the real estate was devised for life only, and the personal property bequeathed without limitation, throws some light upon the intention of the testator.

Stress is laid by the appellant upon the next clause in the will, viz.: "And I also order and direct that all my property, both personal and real, belonging to my estate at the death of my beloved wife, provided that she outlives me, shall be sold," etc. It is claimed by the appellant that the word "belonging" in the sentence "all my property, both personal and real, belonging to my estate," has reference to the time of making the will, or the testator's death, and that the direction to sell includes a direction to sell the property thus bequeathed to Jane; and hence that she could have but a life-estate in it. But we are of opinion that the word "belonging" has reference to the time when the sale is directed to be made, viz., at the death of the testator's wife; and that the direction to sell embraces such property only as might belong to the testator's estate at the time the sale is directed to be made. This would not include the property specifically bequeathed to Jane, for that would not then belong to the testator's estate.

It follows that the decision below was right.

The judgment below is affirmed, with costs.

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139	556
66	376
143	676
66	376
146	633

FRAUDULENT CONVEYANCE.—*Complaint by Surety of Defaulting Guardian, to set aside.*—*Death Presumed from Absence.*—*Decedents' Estates.*—*Heirs.*
—In an action by the surety of a defaulting guardian, against the guar-

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dian and another, to set aside an alleged fraudulent conveyance of real estate by the guardian to his codefendant, the complaint alleged that the guardian had been duly appointed and qualified, with the plaintiff, as surety on his bond, and had received certain moneys belonging to his wards, which he had failed to account for, and which the plaintiff as surety, had been obliged to pay; that the guardian, being the owner of the real estate in question by virtue of an unrecorded deed, and intending to defraud his creditors, destroyed his deed and procured his grantor to execute a deed conveying the same to his codefendant, who was then an infant; that the guardian became insolvent, and had been absent from the State, and had not either been seen or heard from, for over fifteen years; and that, he being presumptively dead, the codefendant was his sole heir. *Held*, on demurrer, that the guardian is presumed to be dead, that the plaintiff's claim can not be prosecuted against the heir until administration be had on the guardian's estate, and therefore that the complaint is insufficient.

SAME.—Limitations.—Exception.—Demurrer.—An action to set aside a fraudulent conveyance must be brought within six years; but, though the complaint show the expiration of the six years prior to bringing the action, that fact does not render it insufficient on demurrer unless it also shows that the action does not fall within any of the exceptions to the statute.

DEATH PRESUMED FROM ABSENCE.—Administrator.—Absence of five years, without tidings, raises the presumption of death, and the appointment of an administrator is proper. See note *a*, 2 R. S. 1876, p. 493.

PLEADING.—Blank Dates.—Uncertainty.—Demurrer.—Material blanks as to dates in a pleading may be reached by a motion to make certain, but not by demurrer.

From the Monroe Circuit Court.

J. W. Buskirk and *H. C. Duncan*, for appellants.

Howk, J.—This was a suit by the appellee, against the appellant, to have a certain deed declared fraudulent as against the appellee, and to subject the real estate therein described to sale for the payment of a certain debt, alleged to be due him from the defendant Henry Baugh.

In his complaint, the appellee alleged, in substance, that on the 22d day of February, 1851, the said Henry Baugh was appointed by the probate court of Monroe county, Indiana, guardian of the persons and estates of William F., Eliza, Nancy and John H. Carman, minor heirs of Jacob Car-

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man, late of said county, deceased, and, as such guardian, gave bond according to law, with the appellee as his surety therein, in the penal sum of one thousand dollars, and took the oath required by law and entered upon the discharge of the duties of his said trust; that afterward, on the 20th day of October, 1851, the said Henry Baugh, as such guardian, received of one Absalom Carman, of Jessamine county, Kentucky, the sum of two hundred and seventy-five dollars and thirty-three cents, belonging and coming to his said wards, and receipted therefor, a copy of which receipt was filed with and made part of said complaint; that afterward, on the — day of —, 18—, said Henry Baugh purchased, from one John M. Anderson, in-lot nine in the town of Harrodsburgh, in said county, for which lot said Anderson and his wife executed to him a deed; that afterward the said Henry Baugh, being greatly involved in debt, and not having sufficient means to pay the same, and the said deed, so executed to him, not having been recorded, with the knowledge and consent of said Anderson, destroyed said deed, and had the said Anderson and his wife, on the — day of —, 18—, to execute another deed for said lot to the appellant Walter Baugh, the infant son of the said Henry Baugh, for the express purpose, upon the part of said Henry Baugh, of wronging, cheating and defrauding his creditors, of whom the appellee was one, out of their and his just rights, and to prevent said lot from being applied to the payment of his, said Henry Baugh's, just debts; that said deed was so executed to said Walter Baugh, without any consideration from him to said Henry Baugh, except natural love and affection, and a copy of said deed was filed with the complaint; that, at said date, the said Henry Baugh was insolvent, and had not means sufficient to pay his debts; that, after the execution of said deed to said Walter Baugh, the said Henry Baugh

left this State and had not since returned, without paying any of his debts, or making any settlement with the proper court as such guardian, and without paying over the said money so received by him, as such guardian, or legally accounting for the same to the court or his said wards, in any way, nor had he accounted for the same since he left this State; that afterward, on the 10th day of November, 1866, the said wards having arrived at the full age of twenty-one years, the said Henry Baugh, as their guardian, having wholly failed to account to them or to the court for the said money, so received by him as such guardian, and the said wards then threatening the appellee, as the surety of their guardian, with a suit on said bond, the appellee, being satisfied of the justness of the claim of said wards, and desiring to save the costs and expenses of litigation, as such surety, settled with the said wards, by paying them in the aggregate the sum of six hundred and eight dollars, being the amount jointly due them from said Henry Baugh, as their guardian, as evidenced by their receipts attached to the complaint; that the said Henry Baugh had not paid the appellee the said sum of money, so paid by him as the surety of said Henry, but that the same, with the interest thereon, remained due and unpaid; that the said Henry Baugh at no time had, nor had he at the commencement of this suit, any other property than the said lot, out of which his debt to the appellee, or any part thereof, could be made; that the said Henry Baugh had been absent from this State for fifteen years, during which time there had been no tidings of or from him, and that he was presumptively dead; that the appellant Walter Baugh was the sole surviving heir at law of the said Henry Baugh; and that the said Henry's wife obtained a divorce from him, and therefore had no interest in said real estate. Wherefore the appellee demanded judgment against said Henry and Walter

Baugh for eight hundred dollars; that the said deed to said Walter Baugh might be declared fraudulent and void as against the appellee; that the said real estate might be sold, under the order of the court, for the payment of the said debt of said Henry Baugh to the appellee, and for other proper relief.

To this complaint the appellant Walter Baugh demurred, upon the ground that the facts stated were not sufficient to constitute a cause of action, which demurrer having been overruled by the court, the appellant Walter excepted to the decision, and then answered by a general denial.

The issues thus joined were tried by a jury, and a verdict was returned for the appellee, finding that there was due him the sum of \$560.00, for moneys paid by him as the surety of said Henry Baugh, as such guardian. The appellant Walter Baugh moved the court for a new trial; and the appellee having entered a *remittitur* of \$60.00 of the amount of the verdict, the court overruled the motion for a new trial, and to this ruling the appellant Walter excepted. Judgment was then rendered on the verdict, declaring that the conveyance to the appellant Walter Baugh, of lot No. 34 in the town of Harrodsburgh, in said county, was fraudulent and void, as against the appellee, and ordering that said lot be sold for the payment to the appellee of the sum of \$500.00, and the costs of this suit.

From this judgment, the appellant Walter Baugh has appealed to this court, and has assigned, as errors, the following decisions of the court below:

1. In overruling his demurrer to the complaint; and
2. In overruling his motion for a new trial.

1. We will first consider the sufficiency of the facts stated in the complaint to constitute a cause of action against the appellant Walter Baugh. We may properly

premise, however, that the complaint is, in some respects, an anomaly in pleading. In the outset of his complaint, the appellee has complained of "Henry Baugh and Walter Baugh," and he has endeavored, apparently, to state a cause of action against both of these defendants. Near the close of his complaint he has alleged, as if it had just occurred to him, that the said Henry Baugh was presumptively dead, because he had not been heard of for fifteen years, and that the appellant was his "sole heir at law." *Nemo est hæres viventis*. In justice to the appellee's attorneys, however, it may be said that these closing allegations were apparently interjected into the original complaint by way of amendment, probably at the suggestion of the court. We allude to this matter, because it is clearly apparent from the entire record, that although the appellee had made Henry Baugh a party defendant to his complaint and action, yet the court below evidently considered and treated the said Henry Baugh as not only dead presumptively, but dead in fact,—so dead that it would not allow an attorney to appear for him in this case.

We are clearly of the opinion, that the appellee's complaint did not state facts sufficient, in any view of this case, to constitute a cause of action against the appellant Walter Baugh. The many blank dates in the complaint are earnestly complained of by the appellant's counsel, as affording sufficient ground for a demurrer to the complaint, for the want of sufficient facts. These blank dates in the complaint are a just subject of criticism; and, perhaps, it would have been error in the court to have overruled a motion requiring the appellee to make his complaint more specific in regard to dates, if such motion had been made. But a demurrer to the complaint, for the want of facts, would hardly reach defects therein, arising merely from the omission of dates.

In this case the appellee failed to allege, as we have

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seen, the date of the alleged fraudulent deed to the appellant Walter Baugh. It may be, that the draftsman of the complaint intended or supposed that this defect or omission therein would be supplied by the copy of the deed, which copy, it was alleged, was filed with the complaint. If it were conceded that the deed in question was the foundation of the appellee's alleged cause of action, in such sense that a copy thereof, if filed with, would become a part of, the complaint (which may be regarded as at least very doubtful), yet, as the record fails to show that such copy was in fact filed, the omission of the date of such deed, in the complaint, was not thereby supplied. It may be gathered, however, from the allegations of the complaint, that the deed to the appellant Walter Baugh was executed at least fifteen years prior to the filing of the appellee's amended complaint, on the 1st day of January, 1874, and more than eight years prior to the commencement of this suit, on the 28th day of August, 1867. For it was alleged in said amended complaint, that, after the execution of said deed, the said Henry Baugh left this State; and elsewhere therein it was alleged that said Henry Baugh had been absent from this State for fifteen years, and nothing had been heard of or from him during that time. So that the conclusion may well be drawn from the allegations of the complaint, that the deed to Walter Baugh was executed prior to the 1st day of January, 1859.

In his complaint the appellee evidently relied upon the alleged fraud of Henry Baugh, in procuring the conveyance of the lot to Walter Baugh, for the purpose of cheating and defrauding the creditors of said Henry, as the ground upon which he asked the court to declare the deed to Walter fraudulent and void as against said Henry's creditors. It was necessary, therefore, that the complaint should state facts sufficient to constitute a cause of

action against the said Henry Baugh; for, without such cause of action against the said Henry, it is very certain that the appellee would not and could not have any cause of action against the said Walter Baugh, or his said lot.

It is claimed by the appellant's counsel, that the complaint was bad, on the demurrer thereto for the want of sufficient facts, because it showed on its face that the appellee's alleged cause of action was barred by the statute of limitations, at the commencement of this suit. It is settled by the decisions of this court, that an action, which seeks to have a conveyance of real estate declared to be fraudulent and void as against creditors, comes within the fourth clause of section 210 of the practice act, which provides that actions "for relief against frauds" must be commenced within six years after the cause of action has accrued, and not afterward. 2 R. S. 1876, p. 121. *Musselman v. Kent*, 33 Ind. 452; *Cravens v. Duncan*, 55 Ind. 347; *Duncan v. Cravens*, 55 Ind. 525. It is also settled, that where the complaint shows that the cause of action is within the statute of limitations, and is not within any of the exceptions contained in the statute, such complaint will be bad on a demurrer thereto for the want of sufficient facts. *Potter v. Smith*, 36 Ind. 231; *Cravens v. Duncan*, *supra*. In this case, the complaint showed that the alleged cause of action was apparently within the statute, but it did not show that it was not within any of the exceptions contained in the statute. Therefore, the complaint was not bad on this ground.

We have hitherto considered the question of the sufficiency of the complaint, without regard to the allegation therein, that the said Henry Baugh, from the fact averred that nothing had been heard of or from him for fifteen years, was presumptively dead. As before stated, it is apparent from the record of this cause, that although Henry Baugh was made a party defendant in appellee's complaint, yet

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the court evidently regarded him as actually dead, and, without process or notice to him of the pendency of the suit, tried and determined the case in his absence. It has long been an accepted rule of law, both in England and in this country, that where a person has left his usual place of abode, and no intelligence concerning him has been received by his relatives, or by those who would probably hear from him, if living, after the lapse of seven years the presumption of life would cease, and such person would be presumed to be dead. 1 Greenl. Ev., sec. 41, and notes.

In this State, in section 1 of "An act to provide for the management and disposal of the estates of persons who have absented themselves from their usual place of residence, and gone to parts unknown," approved March 5th, 1859, it is provided that when any resident of this State shall have absented himself from his usual place of residence, and gone to parts unknown, for the space of five years, leaving property, real or personal, without having made any sufficient provision for the management thereof, and these things were properly presented to the court having probate jurisdiction in the proper county, in the mode prescribed in said section, it should be presumed and taken by the court that such person was dead, and the court should have jurisdiction of his estate in the same manner and to the same extent as if he were dead, and should appoint an administrator for the settlement of his estate, who should have all the powers and rights over such estate, and be subject to all the duties and liabilities in relation thereto, that appertained to other administrators, under the act providing for the settlement of decedents' estates. Acts 1859, p. 33; 2 R. S. 1876, p. 493, note *a*.

It seems to us, therefore, that, under the allegations of the appellee's complaint and the statute of this State applicable thereto, Henry Baugh was presumptively dead,

after he had been gone from the State for five years, and no tidings received of or from him by his family within that time. After the lapse of the five years, the appellee, as a creditor of Henry Baugh, could have procured the appointment of an administrator of his estate, and, under the facts stated in the complaint, such administrator could have procured an order from the proper court for the sale of the lot in controversy, for the payment of such decedent's debts. In section 84 of the act for the settlement of decedents' estates, it is provided that "The real estate liable to be sold for the payment of debts, when the personal estate shall be insufficient therefor, shall include: * *

"*Third.* All lands, and any interest therein, which the deceased in his lifetime may have transferred, with intent to defraud his creditors." 2 R. S. 1876, p. 526.

The appellee's cause of action, as stated in his complaint, was a claim against Henry Baugh, in his lifetime, and at his death it survived against his personal representatives, and not against his heir at law. 2 R. S. 1876, p. 127, sec. 217.

We are clearly of the opinion that the appellee could only collect his claim against the estate of Henry Baugh, by and through an administration of such estate, under the law of this State, and that he can not maintain an action for his said claim against the appellant Walter Baugh, as the heir at law of said Henry Baugh, deceased, until there has first been an administration, under the law, of said decedent's estate. *Leonard v. Blair*, 59 Ind. 510; *Langford v. Freeman*, 60 Ind. 46; *Allen v. Vestal*, 60 Ind. 245.

In any view of the complaint, in this case, it seems to us that it did not state facts sufficient to constitute a cause of action against the appellant Walter Baugh, and that his demurrer thereto ought to have been sustained.

Having reached the conclusion that the appellee's com-
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plaint was insufficient, on the appellant's demurrer thereto for the want of facts, we need not now consider or decide any of the questions arising under the alleged error of the court in overruling the motion for a new trial.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the demurrer to the complaint, and for further proceedings in accordance with this opinion.



66	386
134	579
136	281
136	321
66	386
138	126
66	386
141	362
142	222
66	386
155	12
66	386
160	517
160	520
160	521
160	693
66	386
163	412

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COUNTY AUDITOR.—*Official Bond.*—*Penalty Greater than required by Statute.*—Where the bond of a county auditor is executed in a greater sum than is required by section 2, 1 R. S. 1876, p. 154, it is not void, but the principal and surety are only liable as upon such a bond as the statute requires, and are bound for no greater sum than that required by the statute, as the penalty of such bond.

SAME.—*County Treasurer.*—*Credit for Moneys Paid on Unlawful Orders.*—When orders have been issued by the county auditor, and redeemed by the treasurer, he is entitled to a credit against the county for the amount thereof, although the act of the auditor, in issuing them, was unauthorized and unlawful; for it is the duty of the treasurer to pay the same, out of the proper fund.

SAME.—*Board of Commissioners.*—*Suit on Auditor's Bond.*—*Relator.*—*Estoppel.*—*Ratification.*—*Repeal by Implication.*—In a suit, in such case, upon the auditor's bond, the board of commissioners is the proper relator, and is not estopped or prejudiced by having, in settlement with the treasurer, allowed him the amount of the orders in question, as such allowance and settlement are no ratification of the acts of the auditor in issuing the orders and drawing the money upon them. With respect to the proper relator in such suits, section 12 of the act of May 31st, 1852, 1 R. S. 1876, p. 155, is impliedly repealed by section 7 of the code, 2 R. S. 1876, p. 36, which was approved June 18th, 1852, in so far as the latter conflicts with the former.

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SPECIAL VERDICT OR FINDING.—*What facts to be Found.*—*Venire de Novo.*

—Under the statute of this State, only the facts which are proved upon the trial of a cause are to be found in the special verdict or stated in the special finding; and if the facts proved and found leave some issues in the case undetermined, those issues must be regarded as not proved by the party having the burden of proof; and in such case the special finding is not objectionable because it does not pass upon all of the issues, and affords no sufficient cause for a *venire de novo*.

SAME.—*Supreme Court.*—Where the evidence is not in the record, the Supreme Court will presume that all the facts proved on the trial were found by the court in its special finding.

From the Jefferson Circuit Court.

C. E. Walker, W. S. Roberts, E. R. Wilson, J. R. Cravens,
— *Cravens and J. Roberts*, for appellant.

A. D. Vanosdol and C. A. Korbly, for appellee.

WORDEN, C. J.—This was an action by the appellee, against the appellant, which resulted in a trial by the court, and a finding and judgment for the plaintiff, for the sum of two thousand dollars.

The action was brought against Graham, as a surety on the official bond of Rufus Gale, as the auditor of Jefferson county. The bond was in the usual form of such bonds, but was in the penalty of five thousand dollars. Breaches of the bond were assigned, alleging, among other things, that Gale, during his term of office, had, as such auditor, drawn numerous warrants or orders upon the county treasury, payable to himself, for large amounts, and had presented them to the treasurer for redemption, who had paid the amount thereof to said Gale in redemption thereof; that the orders were drawn without any order of the board of commissioners of the county, or authority of law.

The statute provides that the county auditor “shall, before entering upon the duties of his office, execute his official bond, to be approved by the board of county commissioners, in the penal sum of two thousand dollars,” etc. 1 R. S. 1876, p. 154, sec. 2.

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It is contended by the appellant that the complaint was bad, as counting upon a bond unauthorized by law and therefore void. It may here be observed that there was a special finding of the facts by the court, and conclusions of law thereon stated. The court found, as matter of fact, that there was due the plaintiff over five thousand dollars, but found, as matter of law, that the defendant could only be held liable for the sum of two thousand dollars, the amount of the penalty required by the statute to be nominated in the bond, and rendered judgment accordingly. The appellee insists that the bond is valid as a voluntary bond for the whole amount of the penalty named therein, and has assigned a cross error, which raises this question. These propositions may well be considered together.

The following questions arise: Is an official bond, in a larger penalty than that prescribed by law, void? Or is such bond valid as a voluntary bond for the amount of the penalty named therein? Or is such bond valid to the amount of the penalty prescribed by the statute for such bond?

Without considering how these questions would have to be decided, were they controlled exclusively by the common law, we may observe that they seem to us to be controlled and settled by the statutes of this State.

By section 12 of an act touching official bonds and oaths, 1 R. S. 1876, p. 189, it is provided that "No official bond shall be void because of defects in form or substance, or in the approval and filing thereof; but upon the suggestion of such defects such bond shall be obligatory as if properly executed, filed and approved."

Again, in 2 R. S. 1876, p. 311, sec. 790, is found the following provision:

"No official bond entered into by any officer, nor any bond, recognizance or written undertaking taken by any

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officer in the discharge of the duties of his office, shall be void for want or form of substance, or recital, or condition, nor the principal or surety be discharged; but the principal and surety shall be bound by such bond, recognizance or written undertaking, to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in the bond or recognizance. In all actions on a defective bond, recognizance or written undertaking, the plaintiff or relator may suggest the defect in his complaint, and recover to the same extent as if such bond, recognizance or written undertaking were perfect in all respects."

Construing these statutory provisions, all together, we think it is clear that the Legislature intended that, whatever departure there may have been from the provisions of the statute requiring the bond, in taking it, as to its form or substance, which includes the amount of the penalty named in it, the principal and surety should be bound upon it to the same extent, and no farther, as if the bond had been in all respects such as the law requires; in other words, that the principal and surety should be deemed liable as upon such a bond as the statute requires.

There are many cases in our Reports that tend to sustain the above propositions. It will be sufficient to cite the following: *The State, ex rel., v. Berg*, 50 Ind. 496; *Miller v. McAllister*, 59 Ind. 491.

The defect in the bond sued upon was apparent on its face, and needed no further suggestion. See the case last above cited.

It follows that the bond sued on is not void; nor is it good for the whole amount of the penalty named in it; but it is good for the amount required by law for the penalty of such official bond.

It is also insisted by the appellant, that the board of commissioners was not the proper relator; that the treas-

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urer who redeemed the orders was the proper relator, who alone, if any one, was injured by the wrongful act of the auditor in issuing the orders payable to himself and procuring the money thereon from the treasurer.

The question thus raised is also so intimately connected with another, that they may likewise be considered both together.

It appears by the finding, that after the orders had thus been issued by the auditor, Gale, and redeemed by the treasurer, the auditor reported them to the board of commissioners of the county, and the board examined and allowed them to the treasurer in his annual settlements with the board. This, it is claimed, was a ratification of the acts of the auditor, and precluded the county from going behind the settlement thus made, and raising any question as to the auditor's right to issue the orders.

It is argued by counsel for the appellant, in support of the first proposition, that, as the treasurer was not the bailee of the county, and as the legal title to the funds was in himself, he being liable to account to the county for the amount thereof, as an absolute debtor and not as a bailee, the wrong done was a wrong done to the treasurer and not to the county. See, as to the ownership of the funds and the liability of the treasurer to account to the county for the amount thereof, the cases of *Halbert v. The State, ex rel.*, 22 Ind. 125, *Rock v. Stinger*, 36 Ind. 346, and *Shelton v. The State, ex rel.*, 53 Ind. 331.

But the conclusion by no means follows the premises. Though the title to the funds may have been in the treasurer, and though he may have been bound to account to the county for the amount thereof as an absolute debtor, yet, if he redeemed the orders under such circumstances as entitled him to a credit therefor against the county, the wrong was done to the county and not to the treasurer

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personally, and the board was the proper relator. And if the treasurer was entitled to a credit against the county for the amount paid in redemption of the orders, the board is not precluded from bringing this action by reason of having made settlement with him and having allowed him the amount. Such settlement and allowance are no ratification of the acts of the auditor in issuing the orders and drawing the money upon them.

The question then arises, whether the treasurer was entitled to a credit against the county for the amount paid in the redemption of the orders. We have no doubt that he was.

The auditor keeps the records of the proceedings of the board of commissioners. 1 R. S. 1876, p. 351, sec. 7.

The board has authority "To allow all accounts chargeable against such county, not otherwise provided for." 1 R. S. 1876, p. 352, sec. 13.

The auditor may "draw his warrant upon the treasurer for a sum allowed, or certified to be due by any court of record, authorized to use a seal, and having jurisdiction beyond that of justices of the peace; or by the board of county commissioners." 1 R. S. 1876, p. 62, sec. 3.

It is the duty of the treasurer to "receive all money coming to the county, and disburse the same on the proper orders issued and attested by the auditor." "He shall pay all orders of the auditor when presented, if there be money in the treasury for that purpose, and write on the face of such order the date of redemption, over his signature." 1 R. S. 1876, p. 905, secs. 2 and 8.

It is urged, as we understand the brief of counsel for the appellant, that the treasurer must be presumed to have known the law; indeed, that he was bound to have known it, and to have known, therefore, that an order drawn by the auditor without any allowance therefor, and without authority of law, was illegal, and ought not to be paid, and if he paid it he made the payment of his own wrong.

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It may be conceded that the treasurer was bound to know the law, and to know, therefore, that an order drawn by the auditor without any allowance therefor, or authority of law, was illegal and ought not to be paid. But he was not bound to know the fact that no allowance had been made by the board of commissioners on which to base the orders in question. The auditor, and not the treasurer, as has been seen, is the keeper of the records of the proceedings of the board of commissioners. And, as has also been seen, it was the duty of the treasurer to pay all orders of the auditor when presented, etc. The treasurer is not bound to search the auditor's office to see if there is an allowance by the board of commissioners, or an amount certified to be due by a court of record, on which to base an order drawn by the auditor and presented to the treasurer for payment. That is no part of his official duty. He is justified in paying all orders drawn upon him by the auditor, if there is an appropriate fund in the treasury sufficient for that purpose, for the statute makes it his duty to do so.

The treasurer might, to be sure, if he had knowledge that an order was drawn without any allowance, certificate, or authority of law, refuse payment; and payment could not be coerced, because the order would have no validity.

The treasurer, in this case, was not required to ascertain whether allowances had been made which authorized the issuing of the orders, and had a right to presume that such allowance had been made, and was justified in paying the orders. He was, therefore, entitled to credit, for the amount thus paid, in his settlement with the board. It follows that the county was injured by the wrongful acts of Gale, and that the board is the proper relator. It also follows that the relator is not estopped or in any way prejudiced by having, in the settlement with the treasurer,

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allowed him the amount by him paid in redemption of the orders in question.

It is further urged by the appellant, that the county auditor, and not the board of commissioners, was the proper relator in the case.

This proposition is based upon the following statutory provision in an act approved May 31st, 1852 :

“County auditors are authorized to institute suit and prosecute the same to final judgment and execution, in the name of the State, against principals or sureties, or either, upon any note, bond, mortgage, or any obligation, on account of any trust fund, or other fund, whether such note, bond, or mortgage, be in the name of the State or any other person.” 1 R. S. 1876, p. 155, sec. 12.

This statute, conceding without deciding that the subject of the action would otherwise come within it, can hardly be construed to apply to actions upon the bonds of county auditors, for the Legislature could not have intended that a county auditor should bring a suit against himself. It can make no difference that the particular auditor upon whose bond the suit is brought has gone out of office; for, if the section applies to actions upon auditor's bonds at all, it applies to bonds of those in office as well as those who have gone out.

There is, however, a later statute, which clearly makes the board of commissioners the proper relator in such case. The 7th section of the code of practice, 2 R. S. 1876, p. 36, which was approved June 18th, 1852, provides that “Actions upon official bonds, and bonds payable to the State, shall be brought in the name of the State of Indiana, upon the relation of the party interested.”

This latter statute, in so far as it conflicts with the former, impliedly repeals it. The county is the party interested in the action, because its funds have been diminished by the wrongful act of the auditor, and the board of commissioners is, therefore, the proper relator.

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The defendant filed a motion for a *venire de novo*, because the facts were not sufficiently found. And it is said in the brief of counsel for the appellant, that "The failure of the court to find one way or the other, upon the facts, as to two of the breaches alleged in the complaint, leaves the issues as to those breaches untried, just as the verdict of a jury on one paragraph of a complaint consisting of several paragraphs leaves the issues on the other paragraphs untried, and in such a case a *venire de novo* is awarded."

This makes it necessary to consider to some extent the nature and office of a special verdict or finding.

The statute provides that "A special verdict is that by which the jury find the facts only, leaving the judgment thereon to the court." 2 R. S. 1876, p. 171, sec. 335. The next following section provides that "the court shall, at the request of either party, direct them" (the jury) "to give a special verdict in writing upon all or any of the issues."

By section 341, 2 R. S. 1876, p. 174, it is provided that upon trials of questions of fact by the court, if one of the parties request it, "the court shall first state the facts in writing, and then the conclusions of the law upon them."

There is no difference between a special verdict and a special finding by the court, except that the special verdict finds the facts only, and the court afterward pronounces, or rather applies the law to the facts found, and renders judgment accordingly; while, in a special finding, the court states the conclusions of law upon the facts found, so that the parties can except to the conclusions. Neither a special verdict nor a special finding can do more in relation to facts than to find or state them. But what facts are to be thus found or stated? Clearly those that are proved upon the trial, and none other. When the special verdict has found the facts proved on the trial, it has performed its entire office; and when the special finding has

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stated the facts proved on the trial, it has performed its entire office, so far as the facts are concerned. Of course the facts may be proved by circumstances or otherwise, as in any other mode of trial.

But suppose there are issues in the cause concerning which no evidence is given. There is nothing in such case in relation to those issues for the court or jury, in finding specially, to pass upon. No fact in relation to them has been proved, and, hence, no fact in relation to them is to be found or stated, because, as we have seen, the special verdict or finding is confined to the facts proved.

In the case supposed, it would seem that, in rendering judgment, the issues concerning which no facts are found should be regarded as not proved by the party on whom the burden of the issue or issues lies.

This leads us to inquire what was meant by the provision, that the court may direct the jury to give a special verdict upon all or any of the issues.

This provision, taken in connection with the others, seems to us to have meant that the court might direct the jury to find the facts specially which might be proved in relation to some of the issues, and to find a general verdict upon the others. Such practice might, in some peculiar cases, subserve a good purpose, but we have never known it to be resorted to. The provision clearly does not mean that the jury are to pass upon any of the issues, in finding a special verdict, in any other way than to find the facts proved. And if the facts proved and found do not determine some of the issues, those issues must be regarded as not proved by the party having the burden of proof resting upon him.

Applying the statute, with this construction, to the case before us, the special finding was not objectionable because it did not pass upon all the issues. As to the objection that it did not find all the facts proved, we can not say

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that it is well taken. The evidence is not in the record, and we can not say that all the facts proved were not found by the court. The presumption is that they were.

We have thus examined all the points, as we believe, relied upon for a reversal, and find no error in the record.

The judgment below is affirmed, with costs.



THE CITY OF INDIANAPOLIS v. THE INDIANAPOLIS GAS-LIGHT
& COKE COMPANY.

CITIES.—Power to Contract for Gas.—Statute Construed.—Constitutional Law.—Obligation of Contract.—Under clause 28 of section 53 of the general act for the incorporation of cities, 1 R. S. 1876, p. 291, a city incorporated under said act has power, with respect to the lighting of its streets, public buildings, etc., to contract with a gas company upon that subject, and may exercise such power, within the limits of its franchise, according to its own discretion. Such a contract, when made, must be regarded as made by such city in the exercise of its power to contract, and not in the exercise of its power to legislate, although the power to make the contract be authorized by an ordinance. And when, by the terms of such a contract, the city is not restricted in any respect from the legitimate exercise of its public power touching the subject-matter thereof, but expressly reserves its administrative authority to keep the posts, lamps and burners in good repair, if the company should fail to do so; and also reserves the right to test the quality of the gas furnished by such company and the capacity of the burners at all times; and is not restricted from extending its streets, establishing an additional number of lamps, obtaining gas from other sources or establishing its own gas-works, as the public interests may require; such contract, not being a restriction upon its legislative power, nor fraudulent, nor against public policy, is valid and binding upon such city, may be enforced in the same manner as the contract of a person or a business corporation, and can not be repealed, impaired or changed by the city, by ordinance or otherwise.

From the Marion Superior Court.

R. O. Hawkins, J. A. Henry, S. Claypool, H. C. Newcomb
and *W. A. Ketcham*, for appellant.

B. Harrison, C. C. Hines, W. H. H. Miller, C. Baker, T. A. Hendricks, O. B. Hord and *A. W. Hendricks*, for appellee.

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132	126
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144	120
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BIDDLE, J.—The following is the statement of the case. It is mainly taken from the opinion of HOLMAN, J., in the court below :

The complaint in this cause alleges, in substance, that on the 22d day of July, 1876, the City of Indianapolis and the plaintiff entered into a contract, in due form of law, whereby the latter agreed to furnish gas, of a quality and kind specified in the 3d section of an ordinance of the city, enacted March 19th, 1866, for the supply of all the street lamps, city offices, engine houses, council chamber, tunnels, bridges, station houses, and all other places where gas was required for the use of the city in her corporate capacity, in consideration of an agreed compensation ; that the contract was to be in full force and operation for the term of five years from its date, and a further term of five years, if the city so elected ; that, among other provisions, it contained the following : “ It is further stipulated and agreed, that nothing in this contract shall alter, modify or suspend the provisions of the contract at this time existing between the said party of the first part (the company) and the said city of Indianapolis, as evidenced by the ordinance (of March 19th, 1866, and which was for a term of twenty years), except so far as may be necessary to give effect to the provisions of this contract, and when this contract shall terminate, either by the expiration of the time limited, or by the failure or refusal of the city to perform its part thereof, then the said contract of March 19th, 1866, shall stand and continue for the unexpired term thereof, to be the contract between the parties hereto, * * * in all respects as though this contract had never been made.”

It was also stipulated between the parties, that, if the gas company failed to keep the street lamps and posts clean and in repair, the city should cause them to be cleaned and repaired and deduct the cost from any sum

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of money due to the gas company from the city ; and also that the city should have the right to deduct, from any amount due to the company, fifteen cents for each lamp for each night that it was not lighted and kept lighted during the time required by the time-table ; also, that the city should at all times have the right to test the quality of the gas furnished by the company, and the capacity of the burners on the street lamps.

It is averred that, during the months of June and July, 1878, a controversy arose between the parties, as to the validity of the contract of July 22d, 1876, the plaintiff insisting that the contract was in all respects binding and obligatory on the parties thereto, the defendant denying that the contract was of binding obligation, and claiming the right on behalf of the city, by her mayor and common council, at all times to regulate and change the manner of lighting said city, if such should be deemed for the public interest, and denying that said contract was of any binding obligation, except at the will of said city authorities in their discretion as to the public interest ; and, by reason of said controversy, the streets and public grounds of said city were liable to be left unlighted ; but, notwithstanding, the plaintiff continued to furnish gas and perform its agreements, until the 19th day of August following, when the parties entered into a provisional agreement, which was set out in full in the complaint. After reciting the execution of the contract of July 22d, 1876, that disputes had arisen respecting its validity, and that suit, involving this question, had been instituted by the company, it was provisionally agreed, for the term of one year from August 2d, 1878, that the company should proceed to furnish gas, etc., according to the terms specified, and that, after the expiration of the contract, the parties were to be remitted to whatever rights they had under the contract of July, 1876, and that the provisional agreement was not

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to be construed as against the positions occupied by the parties respecting its validity, etc., nor as barring any right of action the company may have had for gas furnished, etc., on the 1st day of August, 1878. The contract concludes as follows :

“And, for the purpose of determining the right of said company to recover for said gas, and lighting and extinguishing the same, the following facts are agreed, to wit: That said city, on the 29th day of July, 1878, notified said gas company that she did not regard herself bound by said contract of July 22d, 1876, and elected to and did treat said contract as a nullity, and that the city would not pay said company for gas furnished, and for lighting, extinguishing, cleaning and repairing of lamps, under the terms of said contract, on and after the 1st day of August, 1878; and that she (the said city) claimed the right to regulate the lighting of the streets and alleys of said city, and of determining what amount of gas should be consumed by the city; and that the city, by her common council and board of aldermen, had resolved and determined, on and after the said 1st day of August, 1878, not to light the streets and alleys of the city as and in the manner provided for in said contract, and resolved and determined upon other regulations for lighting the streets and alleys of said city. And, after said notice by the city, the said gas company, notwithstanding the objection of the city, proceeded to and did light all the lamps mentioned in said contract of July 22d, 1876 (2840 in number), in all things according to the terms of said contract of July 22d, 1876, on said 1st day of August, 1878. And it is agreed that the gas furnished, and the lighting and extinguishing the said lamps, on said 1st day of August, were and are of the value of two hundred and thirty dollars, according to the terms of the contract of July 22d, 1876. Now if, upon the facts aforesaid, the contract of July 22d,

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1876, was a binding and operative obligation upon the city, on said 1st day of August, 1878, the said gas company shall have judgment for two hundred and thirty dollars; otherwise the city shall recover her costs."

The complaint, in conclusion, alleges that the gas furnished, etc., on the 1st day of August, was, as measured by the prices and terms of the contract of July 22d, 1876, of the value of two hundred and thirty dollars, and judgment therefor was prayed.

To this complaint the defendant interposed a demurrer, assigning for reason that it did not state facts sufficient to constitute a cause of action.

The demurrer was overruled, the defendant excepted, and refused to plead farther; whereupon the court rendered judgment for the plaintiff. The only question in the case therefore is thus presented upon demurrer to the complaint.

The following is the statutory authority upon which the contract is based :

The appellee was incorporated on the 12th day of February, 1851. Local Acts 1851, p. 295. The Legislature reserved no right either to repeal or amend the charter. The first section of the charter creates certain persons named, and their associates, a body corporate and politic. "with perpetual succession." The second section of the charter indicates the purpose for which the corporation was created, to wit: "To manufacture and sell gas, to be made from any or all the substances, or a combination thereof, from which inflammable gas is obtained, and used, for the purpose of lighting the City of Indianapolis or streets thereof, and any buildings, manufactories, public places, or houses therein contained, and to erect necessary works and apparatus for conducting gas in the streets or avenues of said city." The fifth section, after providing that the corporation may make by-laws, etc., not incon-

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sistent with the constitution and laws of the United States, or the State of Indiana, provides: "Said company shall have the privilege of supplying the City of Indianapolis and its inhabitants with gas for the purpose of affording light, for the term of twenty years." The section then makes provision as to the duties of agents, etc., of the corporation, and their control, and concludes with the following proviso: "That nothing in this act shall be so construed as to grant to said Gas-Light and Coke Company the exclusive privilege of furnishing said city with gas, for the purposes within named."

The sixth section is as follows: "The said City of Indianapolis, in its corporate capacity, shall have power to contract with said company to furnish gas for the purpose of lighting the streets, engine houses, market-houses, or any public places or buildings, and may provide means to pay for the same in such manner as they may deem best," etc.

In the general law relating to cities, under which the City of Indianapolis is now incorporated, the fifty-third section, in enumerating the powers of cities, has the following: "*Twenty-eighth.* To construct and establish gas-works, or to regulate the establishment thereof by individuals or companies, or to regulate the lighting of streets, public grounds and buildings, and to provide, by ordinance, what part, if any, of the expense of lighting any street or alley shall be paid by the owners of lots fronting thereon, and in what manner the same shall be assessed and collected, and to make the same a lien upon real estate." 1 R. S. 1876, p. 291.

The city of Indianapolis, at the time the appellee was incorporated, was acting under its original charter granted in 1838. The question was mooted, rather than discussed, whether the city, by abandoning its original charter, and accepting its franchises under the general act for the in-

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corporation of cities, did not forfeit its rights to contract with the Gas Company, as expressly conferred by this sixth section of the act incorporating the company. We do not examine this question particularly, as we are of the opinion that the city had ample authority, under the twenty-eighth clause of section 53 of the general act, as above quoted, to contract with the company concerning the subject-matter in controversy, and, having the power, might exercise it, according to its own discretion, within the limits of its franchise. There is not any doubt but the company had the power to contract with the city. We may thus safely conclude that the parties had the power to contract concerning the subject-matter.

But the appellant claims, that "to regulate the lighting of the streets is a legislative power which can not be delegated away, surrendered or restricted, by contracts or otherwise; and that the contract in question is a restriction upon that legislative power, and therefore invalid." This we understand to be the basis of the appellant's defence to the contract.

As to the power to contract:

All persons may contract unless the power is denied by law, as in case of minority, coverture, imbecility, or other legal disability. No corporation can contract unless the power is granted by law. This power is generally granted to business corporations, as for banking, manufacturing, shipping; and such corporations generally have no legislative or governmental powers, except the power to make by-laws for their own government; they can not pass ordinances for the government of others. Municipal corporations, besides the power to contract, which is generally granted to them within certain limits, have legislative or governmental powers, by which they make by-laws to govern themselves, and pass ordinances to govern others, as the citizens of a town or city within their geographical

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limits. This power to legislate within the authority delegated to them by law is distinct from the power to contract, although exercised by the same corporation. They can not, by contract, delegate or restrict their legislative power, nor can they, merely by their legislative power, make a contract. These two powers need not be confounded. The exercise of the legislative power requires the consent of no person except those who legislate; while it is impossible to make a contract without the consent of another, or others. We think, therefore, that, when the City of Indianapolis made the contract in question with the Gas-Light Company, it made it in the exercise of its power to contract, and not in the exercise of its power to legislate, although the power to make the contract was authorized by an ordinance; and, having the power to make a contract touching the subject-matter, it had the right to make it according to its own discretion as to its prudence or good policy, within the limits of its franchise. Nor can we see that the contract in the least restricts the legislative powers of the city, except that, as the sanctity of the contract is shielded by the constitution of the United States, it can not, in the exercise of its legislative power, impair its validity; for it would be a solecism to hold that a municipal corporation can impair the validity of a contract, when the State which created the corporation, by its most solemn acts, has no such power.

The counsel, upon both sides, who discussed the question before us, seemed to think that the authorities upon the question were seriously in conflict. This court had occasion to remark, in the case of *Roll v. The City of Indianapolis*, 52 Ind. 547, as follows:

“The question presented in this case is one of intrinsic difficulty. The authorities may possibly be reconciled, but they are not entirely harmonious. No doubt the discrepancies sometimes arise out of the differences in the powers

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granted by municipal charters, which are not always distinguished in the decisions, thus leaving us in danger of being misled by propositions which seem general, when they are applicable only to given municipalities."

So we may well say in the present case. We do not think the authorities, upon the principles of construing the powers of municipal corporations, are in serious conflict. If all the charters were the same, we think the authorities would essentially harmonize. It is necessary, therefore, in examining the authorities, to be particular in ascertaining the premises in each case; when they are the same, the authorities will generally agree. They all agree, we believe, in the following propositions: That a municipality can not abridge its legislative power by contract, and that it can not impair a contract by its legislative power; that a municipality can not make a valid contract beyond its power to contract, and that a contract made within its power to contract is valid. So that when the powers granted are different, the conclusions must be different also. But the case of *Rittenhouse v. The Mayor & City Council of Baltimore*, 25 Md. 336, which seems to hold that the repeal of an ordinance authorizing a contract abrogates the contract, it must be admitted, can not be reconciled with the current of authorities. We have found no other case that does not hold upon that point directly the reverse; we therefore can not follow that case.

The case of *Garrison v. The City of Chicago*, 7 Bissell, 480, relied upon by the appellant's counsel, does not seem to us to support their views. That was upon a contract made by the gas company with the City of Chicago, to furnish the city with gas for ten years. At the time the contract was made, or rather at the time when a previous contract was extended, the charter of the city contained a provision that no contract should be made by the city involving any expense, unless an appropriation was previ-

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ously made to meet it ; and the comptroller was required, in May of each year, to submit an estimate of the amount necessary to defray the expenses of the city for the current fiscal year. No such appropriation was previously made, and the court puts the case expressly on that ground, in the following words: "The question to be determined is whether there was a reasonable necessity on the part of the City Council to extend the contract in controversy here, and which will now be mentioned, for ten years from its date, there being no appropriation made commensurate with the obligations of the contract."

Here is a contract, not only without authority in the charter to make it, but made in violation of its express terms, which both parties were bound to know at the time they contracted. Of course such a contract was invalid. The extension of the contract already made, ten years beyond its term, is not different in principle from making a new one.

In the case of *Gale v. The Village of Kalamazoo*, 23 Mich. 344, Gale agreed to build a market-house for the village, which was to be put under the control of the authorities, the stalls to be rented as agreed upon between the parties, the rent of which was to be paid to Gale, the contract to run ten years, and be extended to any other definite time by agreement of the parties.

The village authorities were to appoint a manager of the market, and bound themselves that there should be no other market-house in the village, provided the one so built was large enough to accommodate the public, and also bound themselves to restrict the sale of marketing to that place, during market hours.

It is apparent, in this contract, that the village of Kalamazoo parted with its legislative and administrative power over the market-house, in several essential respects. In the language of COOLEY, J., "Not only was the marketing

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to be confined to one locality, but the plaintiff was to have an unlimited right to control the occupation of the market-house through the power given him to determine the rents to be paid by the lessees. This vested in him a practical monopoly of the public market."

The vice of this contract lay, not in the agreement to have a market-house built, but in the fact that the public authorities had undertaken to part with their control over it when built, and place its management in the power of private speculation. This they could not do.

So, in the case of *City of Oakland v. Carpentier*, 13 Cal. 540, wherein the trustees pretended to convey to "Carpentier and his representatives the exclusive right and privilege of constructing wharfs, piers, and docks, at any point within the corporate limits of the town of Oakland, with the right of collecting wharfage and dockage as he might deem reasonable, upon certain conditions expressed in the ordinance." This contract was held to be invalid, because it parted with the public authority over the wharfs and docks, and left them to be controlled by private interest, and not because the "City of Oakland" had no power to contract for building wharfs and docks.

By the contract we are considering, the City of Indianapolis is not restricted in any respect from the legitimate exercise of its public powers touching the subject-matter of the contract, but expressly reserves its administrative authority to keep the posts, lamps and burners in good order and repair, if the Gas Company should fail to do so; and also reserves the right to test the quality of the gas furnished by the company, and the capacity of the burners, at all times. We can not see wherein, by the contract, the city is restricted from extending its streets, establishing an additional number of lamps, obtaining gas from other sources, or establishing its own gas-works, as the public interests might require, and all this it can do with-

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out violating its contract. No exclusive right is granted to the Gas Company.

A municipal corporation, not having either body, limbs, feet or hands, but being merely a legal entity, can not execute its own acts, nor administer its own affairs. To do this it must employ persons, other corporations, or agencies of some kind, and to employ them and agree to pay them is to make a contract; and if it could not make such contracts, and was not bound thereby, it could not carry on the purposes or attain the objects for which it was established. Its ordinances will not execute themselves; and to deny it the power to have them executed would be to render it useless and helpless. When it makes a contract within the scope of its power—not *ultra vires*—which is not against public policy, and not fraudulent, it must be enforced the same as the contract of a business corporation, or a person. Upon what is averred in the complaint, it is impossible for a court to say that the contract before us is open to any of these objections.

The authorities upon the question are too numerous to notice in detail, but we think their main current supports the views we have taken in this opinion; nor do we think that, upon principle, they are seriously conflicting. The apparent conflict arises from applying their language generally, when it was meant to apply only to some particular municipality. *Dillon Municipal Corp.*, secs. 52, 55, 60, 61, 97, 114, 245, 250, 371, 372, 382, 394, 395, 547, 548; *The Evansville, Indianapolis and Cleveland Straight Line R. R. Co. v. The City of Evansville*, 15 Ind. 395; *Nelson v. The City of La Porte*, 33 Ind. 258; *The City of Indianapolis v. Bly*, 39 Ind. 373; *The City of Crawfordsville v. Hays*, 42 Ind. 200; *The State Board of Agriculture v. The Citizens Street R. W. Co.*, 47 Ind. 407; *The Board of Commissioners of Tippecanoe County v. Everett*, 51 Ind. 548; *Roll v. The City of Indianapolis*, 52 Ind. 547; *The San Francisco Gas Co.*

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v. The City of San Francisco, 9 Cal. 453; *Davenport v. Inhabitants of Hallowell*, 10 Maine, 317; *Bailey v. The Mayor, etc., of the City of New York*, 3 Hill, 531; *Masterton v. The Mayor, etc., of the City of Brooklyn*, 7 Hill, 61; *Milhou v. Sharp*, 27 N. Y. 611; *The Richmond County Gas-Light Co. v. The Town of Middletown*, 59 N. Y. 228; *Devlin v. The Mayor, etc., of the City of New York*, 63 N. Y. 8; *Mayor and Council of Rome v. Cabot*, 28 Ga. 50; *Intendant and Town Council of Livingston v. Pippin*, 31 Ala. 542; *State of New York v. The Mayor, etc., of New York*, 3 Duer, 119; *Britton v. The Mayor, etc., of New York*, 21 How. Pr. 251; *Louisville City R. W. Co. v. City of Louisville*, 8 Bush, 415; *The Harlem Gas-Light Co. v. The Mayor, etc., of New York*, 33 N. Y. 309; *Illinois and St. Louis R. R. and Canal Co. v. City of St. Louis and the Pacific Elevator Co.*, 2 Dillon, 70; *The State of Ohio v. The Cincinnati Gas-Light and Coke Co.*, 18 Ohio State, 262; *Gall v. The City of Cincinnati*, 18 Ohio State, 563; *Minturn v. Larue*, 23 How. 435; *Memphis City v. Dean*, 8 Wal. 64; *Chicago v. Sheldon*, 9 Wal. 50; *Hitchcock v. Galveston*, 6 Otto, 341; *Edwards v. Kearzey*, 6 Otto, 595; *The People v. The Common Council of Detroit*, 28 Mich. 228; *Mayor, etc., of Jackson v. Bowman*, 39 Miss. 671; *Davenport Gas-Light and Coke Co. v. The City of Davenport*, 13 Iowa, 229; *State of Wisconsin v. Milwaukee Gas-Light Co.*, 29 Wis. 454; *The Norwich Gas-Light Co. v. The Norwich City Gas Co.*, 25 Conn. 19; *The Western Saving Fund Society of Philadelphia v. The City of Philadelphia*, 31 Pa. State, 175; *Philadelphia v. Fox*, 64 Pa. State, 169.

The judgment is affirmed, at the costs of the appellant.

ON PETITION FOR A REHEARING.

BIDDLE, J.—In stating the complaint in the above opinion, when first delivered, we included matter which both parties agree had been struck out as surplusage.

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A motion to strike out parts of the complaint had been made below, but what parts nowhere appears in the record; besides, the record shows us that the motion was withdrawn, and does not show us what ruling, if any, was had upon it, nor what exception, if any, was taken to the ruling. We did not suppose, therefore, that any part of the complaint had been struck out. But the absence of what was struck out does not seem to us to affect the question decided in the least. It was wholly immaterial matter. As the complaint now stands, it sets out the contract counted upon, dated July 22d, 1876, and the averments in reference to the contract dated March 19th, 1866, also the provisional contract, made August 2d, 1878. The complaint also avers the performance of the contract of July 22d, 1876, on the part of plaintiff, and assigns the breaches on the part of the defendant by denying its validity and refusing payment under its terms, and shows the agreed statement of facts as to the amount of damages to be adjudged in the event that the contract is upheld. This presents the question of the validity or invalidity of the contract of July 22d, 1876, which is the sole question in the case, and the only one, as we understand the counsel on both sides, which they desire to have settled.

For the purpose of correcting the mistake of including immaterial matter in the complaint, which can not affect the case, it does not seem to us that a rehearing is necessary. The correction has already been made. There can be no doubt, we think, that the complaint, as it now stands, is sufficient, if the contract declared on is valid.

As to the validity of the contract, the question has been fully considered. We understand the case was elaborately argued in the court below. The opinion rendered there by HOLMAN, J., is able and exhaustive. In this court, the counsel diligently collected the authorities touching the question involved, and in their oral arguments discussed

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them thoroughly. We think we are as well advised in the case as it is possible to be. With all these advantages before us, and upon long and careful deliberation, we are entirely satisfied with the opinion delivered, as it now stands.

The petition for a rehearing is overruled.

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159	470

INJUNCTION BOND.—*Approval of Judge need not be Endorsed on Bond.*—*Pleading.*—*Surety's Name need not Appear in body of Bond.*—In a proceeding to obtain an injunction it is proper that the approval of the court or judge should be endorsed upon the bond; but this is not absolutely essential, as the fact that the court orders an injunction to be issued will be considered as conclusive evidence that the court approved such bond; and, in a suit on the bond, an answer denying the approval thereof by the judge is bad, when such fact is so shown by the record. Nor is it material that the name of the surety should appear in the body of the bond.

SAME.—*Insufficient Answer.*—*Assignment for Benefit of Creditors.*—*Delay in levying Execution.*—In a suit by A., upon a bond given in a proceeding by B., an assignee, against A., to enjoin a levy upon an execution, a paragraph of answer, to the effect that after the execution sought, to be enjoined was issued, A., the execution plaintiff, directed the constable having possession of said execution to delay levying the same until further orders, and that, under said direction, execution was not levied until after the assignment of his property by the execution defendant to B. for the benefit of his creditors and the recording of said assignment, whereby the lien of said execution was lost, etc., does not state facts which would have constituted sufficient ground for an injunction, had they been incorporated in the complaint in the injunction suit, and such answer is, therefore, bad on demurrer.

SAME.—*Assignee.*—*Judgment.*—In such case an answer by B., that the bond in suit was executed by him in his capacity as trustee, and that the trust estate is not settled, is bad on demurrer. Its facts constitute no bar to the suit, and could only affect the form of the judgment.

SAME.—*When Delay in Levying does not affect Lien of Execution.*—*Priority.*—Where there are no junior liens of any kind upon the personal property of the execution defendant, directions by the execution plaintiff to delay

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proceedings upon an execution in his favor do not affect the lien of his execution.

SAME.—*Effect of Assignment on Lien of Execution.*—The simple assignment of his property by an execution defendant, for the benefit of his creditors, does not divest the lien of the execution.

SAME.—*Damages.*—When an injunction is obtained without cause, the obligee in the bond given in that proceeding is entitled, in a suit upon such bond, to recover full compensation.

RES ADJUDICATA.—See opinion, for rules at length, on this subject.

From the Marion Superior Court.

H. W. Harrington, for appellants.

D. V. Burns, for appellees.

PERKINS, J.—On the 24th day of September, 1874, Andrew Wallace recovered a judgment, before a justice of the peace, against George Borsdorfer. On the 14th day of October, 1874, an execution was issued on said judgment, and placed in the hands of constable Boardman, and, on the 20th day of October, 1874, was levied on property of said Borsdorfer. On the 15th day of October, 1874, an assignment by said Borsdorfer of all his property to George O. Griffin, for the benefit of his creditors, became operative. Said Griffin obtained an injunction upon the execution of Wallace against Borsdorfer, from the Marion Circuit Court, and, as incident thereto, gave an injunction bond, with Joseph W. Nichol as surety therein. The main ground on which the injunction was obtained was an alleged agreement of Wallace, at the rendition of the judgment, that no execution should issue on the judgment for six months, and upon the faith of which the judgment was permitted by the defendant to go. That injunction suit was appealed to the Supreme Court, where it was decided against Griffin. *Boardman et al. v. Griffin*, 52 Ind. 101.

The court decided that Griffin had not proved the case made in his complaint for an injunction, and held that the judgment on which the execution issued could not be attacked collaterally.

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The following are the closing paragraphs of the opinion in the cause :

“ The court [below] has very clearly, in the special findings, found against the plaintiff as to the case made by his complaint, and we do not see why judgment should not have been rendered against him. We do not regard the question as one of variance merely, which might be obliterated by an amendment under sections 94 and 95 of the civil code ; but we think the case is one where the allegations of the complaint, to which the proof was directed, are unproved, not in some particulars only, but in their general scope and meaning, according to section 96.

“ In our judgment, the court should have rendered judgment on the finding for the defendants. In this view of the case, we do not deem it necessary or proper to express any opinion upon the question as to the effect of the delay in making the levy of the execution after it was issued.

“ The judgment is reversed, with costs, and the cause remanded, with instructions to render judgment for the defendants on the special findings.” Such judgment was rendered.

The present suit was brought on the injunction bond given by Griffin on instituting the suit to enjoin the execution of Wallace upon his judgment above mentioned.

The complaint sets out the facts, alleges damages, makes the bond an exhibit, etc.

A demurrer to the complaint for want of facts was overruled, and exception entered.

The defendants answered :

1. The general denial.

2. “ That said supposed bond in the complaint set out was never approved by the judge of said Marion County Civil Circuit Court.”

3. As to the amount of the judgment for one hundred and ten dollars, mentioned in the complaint, defendants say that an execution was issued on said judgment, on the

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15th day of October, 1874, but that Wallace, the plaintiff in said judgment, after execution was issued thereon, directed the constable having possession of said execution, to delay levying the same until further orders, and that, under said direction, execution was not levied till after the assignment of his property by the execution defendant to said Griffin for the benefit of his creditors, and the recording of said assignment, whereby the lien of said execution was lost, etc.

4. That Borsdorfer made the assignment, etc., as alleged in paragraph 3 of the answer; that appellant Griffin executed the bond sued on in his capacity as trustee, etc.; and that the trust estate is not settled, etc.

A demurrer was sustained to the second, third and fourth paragraphs of answer.

The court did not err in sustaining the demurrer to the second paragraph of answer. The injunction or restraining order commences as follows, viz.:

"Upon the complaint in the above action, verified by oath, showing an emergency exists for issuing a restraining order, without notice, in said action, and upon affidavits filed, the plaintiff having executed the undertaking required by law, it is ordered," etc.

"LIVINGSTON HOWLAND, Judge."

This was shown by the record.

It is proper, but not absolutely essential, that the approval of the court or judge should be endorsed upon the bond or undertaking.

In *Patterson v. Stair*, 26 Ind. 137, the court say: "We must also consider the fact that the undertaking was read to the court, and thereupon the restraining order was continued, as conclusive evidence that the court approved the bond."

Nor, we may remark, was it material that the name of the surety should appear in the body of the bond. *Potter v. The State*, 23 Ind. 550.

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An answer denying the existence of a fact, the existence of which is shown by the verdict, is bad.

The third paragraph of answer was pleaded to a part of the cause of action. An answer pleaded to the whole, which answered but a part, of the cause of action, would have been bad for that reason. *Bicknell Civil Prac.* 86; *Stone v. Lewman*, 28 Ind. 97.

Two questions are presented and discussed upon the sustaining of the demurrer to said third paragraph, viz.:

1. Was the judgment for the defendant Wallace, in the injunction suit, a bar to the right of Griffin, plaintiff in that suit, to set up affirmatively, in this suit on the bond given in the former, additional grounds, showing that the execution sought to be enjoined in the injunction suit was not a lien upon the property of the execution defendant?

2. Did the delay, by the order of the execution plaintiff, in levying his execution, extinguish the lien of said execution on the property of the execution defendant, as against any one? and if so, whom? See *Sipe v. Holliday*, 62 Ind. 4.

In the suit to enjoin the execution mentioned, Griffin, as ground therefor, alleged that the judgment on which it issued was erroneous, and that it was agreed by Wallace, at the rendition of the judgment, for a valuable consideration, that no execution should issue upon it for six months, while, in fact, execution was issued, in violation of said agreement, in a much shorter time.

On the trial in the circuit court, Griffin failed to prove the agreement for delay, alleged in his complaint, but was allowed to, and did, prove a delay to levy said execution, by order of Wallace, the execution plaintiff, as set up in the third paragraph of answer.

Upon the final hearing of the injunction suit, in the Supreme Court, Griffin failed because the judgment could

not be attacked collaterally, and because he failed to show the existence of such an agreement touching the issue of execution, as he had alleged in his complaint, though he did prove a different agreement for delay. Now, in this suit against him on the bond in the injunction suit, Griffin set up in the third paragraph of his answer this different agreement for delay from that relied on in the injunction suit, showing, as he claims, that said execution was invalid, and ought to have been enjoined. He might have inserted all these causes in his complaint for the injunction, but, as we have seen, did not. Hence it is argued, that he could not institute a new suit for such injunction, on different grounds from those alleged in the former suit; that this would violate the rule that, in any given suit, the judgment in such suit is presumed to have determined every question which might have been litigated in it, and the rule that a party can not split a cause of action, thus multiplying suits; and hence, that Griffin could not set up affirmatively, as a defence to the action on the injunction bond, matters which he could not have made the ground of a new suit for an injunction.

But, in their argument, counsel, to some extent, mistake the scope and application of the two rules referred to.

The rule that every question which might have been decided or litigated in a cause, will be presumed to have been decided, means that everything which was within the issues in the cause, and might have been proved under them, will be presumed to have been proved and adjudicated upon. But what was not embraced by the issues made, though issues broad enough to embrace such matter might have been made, will not at least be conclusively presumed to have been determined. *The Lessee of Lore v. Truman*, 10 Ohio State, 45; *Babcock & Co. v. Camp*, 12 O. S. 11; *Louw v. Davis*, 13 Johns. 227; *Gould v. Evansville, etc., R. R. Co.*, 1 Otto, 526; *Byrket v.*

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The State, 3 Ind. 248, and note; *The State v. Brutch*, 12 Ind. 381; *Bright v. Coffman*, 15 Ind. 371, on p. 373; *Phillips v. Berick*, 16 Johns. 136. *The Indianapolis, etc., R. R. Co. v. Clark*, 21 Ind. 150, is in point, and so is *Bougher v. Scobey*, 21 Ind. 365. See *Jenkins v. Parkhill*, 25 Ind. 473; 2 Chitty Plead., 16th Am. ed., 421.

It was upon this very ground that *Boardman v. Griffin*, 52 Ind. 101, was decided. The court said: "When the trial of a cause is by the court, instead of a jury, whether the court is required to find the facts specially or not, it can not, any more than a jury can, go outside of the case made by the pleadings. In such cases, as well as in others, the parties must recover upon the allegations of the pleadings. They must recover *secundum allegata et probata*, or not at all. It must be so in the nature of things, so long as our mode of administering justice prevails." See, also, *The Town of Cicero v. Clifford*, 53 Ind. 191; *The Fishback, etc., G. R. Co. v. Wilson*, 31 Ind. 371.

And the splitting of a cause of action does not mean the suing upon several causes of action, in different suits, which might all be united in one, but the bringing of a suit for a part of a single cause of action, as for part of the price of an article sold. A second suit for the other part could not afterward be maintained. So, on an entire contract for the purchase of several articles of goods, but a single cause of action exists, and a single suit can be maintained. *Smith v. Jones*, 15 Johns. 229. So a single tort that injures several articles of property belonging to the same person. *Farrington v. Payne*, 15 Johns. 432; *Secor v. Sturgis*, 16 N. Y. 548; *Miller v. Covert*, 1 Wend. 487; *O'Beirne v. Lloyd*, 43 N. Y. 248. See *McEwen v. Bigelow*, 40 Mich. 215.

But, in any given case, where the plaintiff has sued in assumpsit, or in any action, for a number of separate causes of action which might be joined, making the ag-

gregate of such causes the amount for which he demands judgment, if neglecting to withdraw any of those causes from the jury or court on the trial, he fails to establish any of them by proof, he can not afterward bring another suit for those items. *Seddon v. Tutop*, 6 T. R. 607; *Lord Bagot v. Williams*, 3 B. & C. 235; *O'Beirne v. Lloyd*, *supra*; *Whart. Ev.*, sec. 788; *Freeman Judgments*, sec. 272; *Town v. Smith*, 14 Mich. 348. See, as to torts, *Swinney v. Nave*, 22 Ind. 178.

And it is enacted in the code, 2 R. S. 1876, p. 196, sec. 401, that:

"When the plaintiff shall, at the same court, bring several actions against the defendant, upon demands which might have been joined in one action, he shall recover costs only in one action, unless it shall appear to the court that the actions affect different rights or interests, or other sufficient reasons exist why the several demands ought not to have been joined in one action." See *Bicknell Civil Prac.* 129, 330, 571.

It may not be improper, and may conduce to a clearer view of the subject, to state here the general rules touching a plea or answer of former recovery, as established by the decisions of the Supreme Court of this State.

1. A judgment for the defendant, upon a demurrer to the complaint on account of the omission of an essential allegation therein, which is supplied in the second suit, will not be a bar to the second suit. *Stevens v. Dunbar*, 1 Blackf. 56; *Braman v. Hawk*, 1 Blackf. 392; *Sherry v. Foresman*, 6 Blackf. 56; *Estep v. Larsch*, 21 Ind. 190; *Sumpter v. Wilson*, 1 Ind. 144; *Gould v. Evansville, etc., R. R. Co.*, *supra*.

2. An answer of former recovery must show that, in the suit in which the judgment pleaded was rendered, the same material question, on which the second suit depends, was, or might have been, decided. *Cutler v. Cox*, 2 Blackf.

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178; *Stingley v. Kirkpatrick*, 8 Blackf. 186; *Kirkpatrick v. Stingley*, 2 Ind. 269; *Hargus v. Goodman*, 12 Ind. 629; *The Eaton, etc., R. R. Co. v. Hunt*, 20 Ind. 457; *The Indianapolis, etc., R. R. Co. v. Clark*, 21 Ind. 150; *Henson v. Veatch*, 1 Blackf. 369. Where the record does not show the fact, it may, in some cases, be shown by parol evidence. *Angel v. Hollister*, 38 N. Y. 378; *The Board, etc., v. The Mineral Point, etc., R. R. Co.*, 24 Wis. 93; *Bougher v. Scobey*, 21 Ind. 365.

3. Another general rule is, that the issues in the case must embrace the merits of the case. *Cutler v. Cox*, *supra*; *Paine v. The State*, 7 Blackf. 206; *Estep v. Larsh*, 21 Ind. 190; *Athearn v. Brannan*, 8 Blackf. 440.

In *The Columbus, etc., R. R. Co. v. Watson*, 26 Ind. 50, it is said:

"In order to be a good answer of former adjudication, it must appear that the matters in controversy in the case at bar either actually were determined in the former action, or that they might have been litigated under the issues."

In *Duncan v. Holcomb*, 26 Ind. 378, it is decided that "It is only the matters involved in the issues made by the pleadings in a cause that are considered *res adjudicata*." See *Wilson v. Ray*, 24 Ind. 156. In Wharton's Evidence, sec. 782, it is said: "The judgment, to operate as *res adjudicata*, must be on the merits," citing many authorities.

Under this rule, it is held that a judgment for the defendant in a suit prematurely brought is no bar to a subsequent suit. *Kirkpatrick v. Stingley*, 2 Ind. 269, on p. 273; *The Eaton, etc., R. R. Co. v. Hunt*, 20 Ind. 457, on p. 468; *The Indianapolis, etc., R. R. Co. v. Clark*, 21 Ind. 150, on p. 153; *Brandon v. Judah*, 7 Ind. 545; *Simonton v. The Huntington, etc., Co.*, 12 Ind. 380.

4. The following rule is laid down in 2 Taylor on Evidence, sec. 1513:

"The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

If the above proposition is given an application, in practice, as broad as its language, it is irreconcilable with the proposition that a judgment against a party on account of a defective complaint, is no bar to a new suit on the same subject of litigation, upon a good complaint; also, with the doctrine that a judgment upon the trial of a cause, which does not embrace the merits of the cause, is not a bar to a second suit; also, with the maxim *secundum allegata et probata*; but if its application is limited to cases where the parties fail in the proof of all that is within the issues in the cause, but such failure is not shown by the record, or where they sue upon parts of causes of action, it is in harmony with settled principles of law; and the cases which the author refers to in the succeeding section, in illustration of the proposition, indicate that such was his construction of it.

Miller v. Covert, 1 Wend. 487, is one of the cases, and we give it as an example. The opinion of the court substantially states the case, and is as follows:

"The court below erred in permitting Covert, the defendant, to prove and set off against Miller, his account for the balance of the three tons of hay sold and delivered to him in January, 1827. The sale of the hay was by one single indivisible contract. Miller agreed to purchase three tons of hay from Covert, and Covert agreed to sell it to him if he had so much to spare, and in the course of a few days delivered the whole. It is perfectly settled, that if a plaintiff bring an action for a part only of an entire and indi-

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visible demand, the verdict and judgment in that action are a conclusive bar to a subsequent suit for another part of the same demand. If Covert could not have brought an action for the residue of the three tons of hay, he of course could not avail himself of it by way of off-set when sued by Miller."

See *Reeves v. Plough*, 46 Ind. 350. See, also, *Crosby v. Jeroloman*, 37 Ind. 264, in which the above proposition from Taylor is substantially quoted, as it is in *Comparet v. Hanna*, 34 Ind. 74, in *Bates v. Spooner*, 45 Ind. 489, and in *Fischli v. Fischli*, 1 Blackf. 360.

5. As to defendants, this rule of law is laid down in Wharton Ev., sec. 789 :

"Where a party, sued on a debt, on which he has made a partial payment, omits, when he is able to do so, to prove such payment, he can not afterward maintain a suit against his original creditor for the payment. Whenever, to put this conclusion in general terms, it is the duty of a party, when sued, to defend and protect his rights, then, if he omit this duty, he can not afterward, as plaintiff, sue for such rights. If, from any circumstances, it is his duty to present his defence, and leave it to be determined by court and jury, then if he neglect this duty his claim is lost to him."

The rule is not put, in the above quotation, upon the ground of *res adjudicata*, but rather of waiver or abandonment, as in the case where a plaintiff sues on a part of a single cause of action. See *Swinney v. Nave*, 22 Ind. 178.

We proceed to enquire whether the new matter alleged in the third paragraph of the answer would have constituted sufficient ground for an injunction had it been incorporated in the complaint in the injunction suit; for, if it would not, it is insufficient, at all events, to constitute an answer. We think the matters alleged in the answer in this cause are insufficient grounds for an injunction.

The court did not err in sustaining the demurrer to the fourth paragraph of answer. Its facts constituted no bar to the suit. They could only have affected the form of the judgment.

Directions by the execution plaintiff to delay proceedings upon an execution do not release or avoid the lien of said execution upon the personal property of the execution defendant, but may postpone such execution to junior executions in favor of the owners thereof. *McCall v. Trevor*, 4 Blackf. 496; *Johnson v. McLane*, 7 Blackf. 501; *Moore v. Fitz*, 15 Ind. 43; *Zug v. Laughlin*, 23 Ind. 170. In this case there were no junior liens of any kind upon the property.

A sale of the property, bound by the lien of an execution, by the execution debtor, does not divest such lien. *McCall v. Trevor*, *supra*.

If an absolute sale to a *bona fide* purchaser would not divest such lien, much less would the simple assignment of the property, such as that made in this case, have that effect. Suppose the execution defendant, instead of assigning the property, had sold it to raise money to pay his debts, would not the purchaser have taken it subject to the lien upon it?

Other alleged errors need not be noticed.

The damages given in the cause were not excessive. The injunction was obtained without cause. The party was entitled to full compensation.

There was no objection taken to the form of the judgment. See *Baker v. Horsey*, 21 Ind. 246; *Wilkerson v. Rust*, 57 Ind. 172.

But the court holds that the judgment was right as rendered.

If a second injunction had been or might have been obtained, we decide nothing as to the effect, if any, such

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fact might have had on the present suit on the bond given on obtaining the first injunction.

Judgment affirmed, with costs.

Petition for a rehearing overruled.

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NEGLIGENCE.—*Complaint.*—*Motion to make Specific.*—*Demurrer.*—In an action for damages resulting from alleged negligence, insufficiency of the averments of negligence can be reached by motion to make specific, but not by demurrer.

MALPRACTICE.—*Action by Wife.*—*Joinder of Husband.*—*Party.*—Under section 8 of the practice act, 2 R. S. 1876, p. 36, the husband must join with the wife in an action by her against a physician for malpractice; but, under the act of March 25th, 1879, Acts 1879, p. 160, she may sue alone.

SAME.—*Complaint.*—*Defect of Parties.*—*Demurrer.*—*Evidence.*—In an action by a married woman, brought by her in the name of herself and husband, but demanding damages solely in her own right, against a physician, for malpractice, she alleged, as a reason why her husband had not joined her in the action, that he had abandoned her and left the State.

Held, that a demurrer for a defect of parties plaintiffs should be sustained, but that such defect is not presented by a demurrer for insufficiency.

Held, also, that evidence of the alleged abandonment of the wife by the husband was incompetent.

From the DeKalb Circuit Court.

J. R. Coffroth and T. A. Stuart, for appellant.

Howk, J.—In this action, the appellee Amanda Leonard sued the appellant in a complaint of a single paragraph, wherein she alleged, in substance, that the appellant, being a physician and surgeon, on or about the 12th day of August, 1874, as such physician and surgeon, for a valuable consideration to be therefor paid, undertook to treat and attend the appellee Amanda, whose right arm was broken,

and fractured and dislocated, faithfully, carefully and skilfully, and carefully and skilfully to reduce said fracture, and to set and properly adjust said broken arm, and diligently, faithfully and skilfully endeavor to heal and cure the same; that the appellant, not regarding his said undertaking, did not carefully and skilfully reduce said fracture, and properly set said broken arm, nor did he carefully, diligently and skilfully endeavor to cure and heal the same, but, on the contrary, the appellant so carelessly, unskilfully and negligently conducted himself in and about the reduction of said fracture and the setting of said broken arm, and in and about the healing and curing thereof, that the said arm was stiff, useless and crooked, and would so remain permanently; that because of the careless, unskilful and negligent manner in which the appellant had treated said arm, she had suffered great and long continued pain, and was thereby deprived of the use of said arm, and would remain a cripple for life; that her co-plaintiff, Charles Leonard, was her husband, to whom she was married on the — day of —, 187—; that, from the time of their marriage, he had utterly and unreasonably failed to provide for her support, in consequence of which she had been obliged to return to her father's house, shortly after her marriage, where she had since remained; that thereafter, and long before her arm was so broken, her said husband and co-plaintiff had abandoned her and left this State, going to parts unknown to her; that she therefore brought this action in the names of her said husband and of herself, as she might lawfully do; and that, by means of the said wrongs of the appellant, she had been damaged in the sum of five thousand dollars, for which she demanded judgment.

To this complaint the appellant demurred, upon the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled by the

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court, and to this ruling he excepted. He then answered the complaint by a general denial thereof.

The issues joined were tried by a jury, and a general verdict was returned for the appellee, assessing her damages in the sum of one thousand dollars.

The appellant's motion for a new trial having been overruled by the court, and his exception entered to this decision, judgment was rendered on the general verdict.

In this court, the appellant has assigned, as errors, the following decisions of the circuit court:

1. In overruling his demurrer to the complaint; and,
2. In overruling his motion for a new trial.

We will consider and decide the questions arising under these alleged errors, in the order of their assignment.

1. Under the first alleged error, it is claimed by the appellant's counsel, that the appellee's complaint was bad, on the demurrer thereto, because "the allegations as to negligence are not sufficient." If the complaint was defective on this ground, as it probably was, it is very clear, we think, that the defect was one which could not be reached by the demurrer to the complaint, for the want of sufficient facts. Such a defect, if it existed, could have been reached only by a motion to make the complaint, or the particular allegations thereof, more specific as to negligence. *The Cincinnati, etc., Railroad Co. v. Chester*, 57 Ind. 297; and *The Pennsylvania Co. v. Sedwick*, 59 Ind. 336.

The appellant's counsel also insist, that the demurrer to the complaint ought to have been sustained, because, as they say, "the law is well settled, that a married woman can not maintain an action like the one at bar, without her husband joining with her. Both in the original and in the amended complaint the wife alone complains, and she alone demands judgment." It may be conceded, that both the law and the facts of this case are as the appellant's counsel

have stated them to be, in the above quotation from their brief of this cause. *Long v. Morrison*, 14 Ind. 595; and *Rogers v. Smith*, 17 Ind. 323. At common law, in suits for injuries to the person of a married woman, husband and wife must join as plaintiffs; and this rule of law has not been changed by any of the provisions of our code of practice. Indeed, in section 8 of the practice act, it is expressly provided that, "When a married woman is a party, her husband must be joined with her; except:

"*First*. When the action concerns her separate property, she may sue alone.

"*Second*. When the action is between herself and her husband, she may sue or be sued alone," etc. 2 R. S. 1876, p: 36.

It appeared upon the face of the appellee's complaint, in this case, that she was a married woman, and that Charles Leonard was her husband and had not joined with her, in bringing this suit. It is certain, therefore, that the complaint was subject to a demurrer for the fourth statutory cause of demurrer; for there was an apparent defect of parties plaintiffs, on the face of the complaint, in this, that the said Charles Leonard, under the law then in force, was a necessary party plaintiff, in this action. But it is equally certain, we think, that this defect in the complaint was not reached by the appellant's demurrer thereto, upon the ground that it did not state facts sufficient to constitute a cause of action. The court did not err, in our opinion, in overruling the demurrer to the complaint.

We may properly remark, in this connection, that the appellee's husband is not now a necessary party plaintiff, in this suit; for, in section 6 of "An act concerning married women," approved March 25th, 1879, it is provided that "A married woman may bring and maintain an action in her own name against any person or body corporate for damages for any injury to her person or character, the same as if she were sole; and the money recovered shall

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be her separate property, and her husband, in such case, shall not be liable for costs." Acts 1879, p. 160.

2. Under the second alleged error, the first question presented and discussed by the appellant's counsel relates to the admission of certain evidence on the part of the appellee, on the trial of the cause, over the appellant's objections. It appears from a bill of exceptions properly in the record, that on the trial the appellee Amanda Leonard was a witness, and, over the appellant's objections, was permitted to testify, "that she was the wife of her co-plaintiff, Charles Leonard, that her said husband had left her and failed to provide for her for more than a year prior to that time and to the commencement of said action, and that he had abandoned her at that time, and left the State of Indiana." "To the admission of which witness and of her testimony, the defendant objected, *first*, on the ground that her evidence was against her husband and his interest in said suit; *second*, on the ground, if it were not against her husband and his interest in said suit, it was in favor of his interest and of him in said suit, and, in either case, as his wife, she was incompetent to testify; *third*, that such evidence was incompetent and irrelevant. But the court overruled the said objections, to which ruling the defendant at the time excepted."

It seems to us that the court erred in the admission of the appellee's evidence above set out, on the ground of its incompetency and irrelevancy to the matters in issue. The gist of the appellee's action against the appellant was his alleged negligence and unskilfulness, in the treatment of her fractured arm. It is certain, we think, that the facts of the appellee's abandonment by her husband, and of his failure to provide for her, were entirely foreign to the questions in issue between her and the appellant, and could not have any legitimate bearing upon the proper decision of those questions. We need hardly say, for this is self-evident, as it appears to us, that those facts would

not tend, even remotely, to show any lack of skill, any want of care, or any negligence, of any kind or degree, on the part of the appellant, in his treatment of the appellee's injuries. We have no brief of this cause from the appellee or her counsel, in support of the decision of the court, in the admission of the evidence of the appellee in regard to her abandonment by her husband, or his failure to provide for her, over the appellant's objections thereto, and we confess our inability to conceive of any legal grounds upon which the ruling of the court can be justified or sustained. The evidence was irrelevant, and it seems to us that its manifest tendency, in the language of the appellant's counsel, was "to mislead the jury, direct their minds into wrong channels, and excite and enlist their sympathies in favor of the plaintiff, on account of her destitute and forlorn condition."

The only other questions discussed by the appellant's counsel are the alleged misconduct of the appellee, and of one of the jurors, during the progress of the trial, and the insufficiency of the evidence to sustain the verdict. We do not deem it necessary for us to consider and decide any of these questions in this opinion. It is not probable that the alleged misconduct, either of the appellee or of the juror, will be repeated on another trial of the cause; and, as the conclusion we have reached, in regard to the error of the court in the admission of the appellee's evidence, may lead to a new trial, the sufficiency of the evidence to sustain the verdict can hardly be regarded as a proper subject of inquiry or comment by this court, until after such new trial.

For the reasons given, we think the court erred in overruling the appellant's motion for a new trial.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

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CRIMINAL LAW.—Murder.—State of Feeling between a Witness and Deceased.—Harmless Evidence.—Upon the trial of a person charged with the murder of his wife, evidence as to the state of feeling existing between a witness on behalf of the State and the deceased, before her death, and seven years before the trial, was irrelevant, but harmless to the defendant.

SAME.—Parol Evidence of pendency of Divorce Suit by Deceased against Accused.—In such case, parol evidence was admissible to show that a suit for divorce and alimony had been pending, wherein the deceased was plaintiff and the accused was defendant.

SAME.—Attorney.—Conversation of, with Witnesses.—In a prosecution for murder, a subpoena for witnesses, which the accused had caused to be issued on a former trial, and testimony that an attorney for the accused had had a conference with such witnesses, but not tending to elicit the conversation, were useless to the case as evidence, but harmless to the accused.

SAME.—Instructions.—Inference from Facts.—An instruction to the jury, substantially, that, in determining what facts were proved in the cause, they should carefully consider all the evidence given before them, together with all the circumstances of the transaction in question detailed by the witnesses during the trial, and that they might find any fact to be proved, which might be rightfully and rationally inferred from the evidence given, is correct.

SAME.—Premeditated Malice, what Necessary to Constitute.—An instruction, that premeditated malice is where the intention to unlawfully take life is deliberately formed in the mind, and that determination meditated upon before the fatal stroke is given, but that there need be no appreciable space of time between the formation of the intention to kill and the killing, that they might be as instantaneous as successive thoughts, and that it is only necessary that the act of killing be preceded by a concurrence of will, deliberation and premeditation on the part of the slayer, is proper.

SAME.—One Instruction Corrected by Another.—An instruction which is contrary to law can not be corrected by another instruction on the same subject, which is according to law, unless the former be withdrawn; but an instruction which is merely imperfect because it does not fully state the law, yet states it correctly as far as it goes, may be completed by another instruction which supplies its defect.

SAME.—Clerical Error in Instruction.—Where a clerical error in an instruction is plainly shown and corrected by the context, the accused, in whose favor such error would operate, can not complain of it.

SAME.—Harmless Refusal.—Where an instruction given by the court covers the ground of one asked by the defendant and refused, the refusal is harmless.

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SAME.—An instruction asked on behalf of the defendant, that the tracks of some person, attempted to be proved as leading to and from the window of the house where the deceased was at the time of the alleged shooting, is a material circumstance in the case, and if, from all the evidence in the cause, the jury should have a reasonable doubt as to whether the defendant made such tracks, they should find him not guilty, does not express the law, as the defendant's guilt might have been established by other evidence.

SAME.—*Weight of Evidence.*—Where instructions asked assume, as proved, that the accused had made certain statements when arrested, and instruct the jury as to the weight to be given to certain testimony, they ought to be refused.

From the Clinton Circuit Court.

L. McClurg and *J. V. Kent*, for appellant.

T. W. Woollen, Attorney General, *W. R. Moore*, Prosecuting Attorney, *N. R. Linsday* and *J. F. Elliott*, for the State.

BIDDLE, J.—At the May term of the Howard Circuit Court, 1870, the appellant was indicted for the murder of Rachel Binns.

He was twice tried and convicted of the crime in the Howard Circuit Court; but the judgment in each case was reversed by this court, for errors occurring in the court below. *Binns v. The State*, 38 Ind. 277; *Binns v. The State*, 46 Ind. 311.

The venue was then changed to the Clinton Circuit Court, wherein the appellant was again tried, and again convicted, and the judgment again reversed by this court, for intervening error in the court below. *Binns v. The State*, 57 Ind. 46.

Subsequently, he was tried the fourth time, and the fourth time convicted, and sentenced, by the judgment of the court, to imprisonment in the state-prison during life. From this judgment he again appeals to this court.

The counsel for the appellant present fourteen questions for our consideration, which we shall examine, not in the

order they are presented, but in the order in which they arose at the trial.

1. The State's counsel asked several questions of the witness, Page Sims, called on behalf of the State, touching the state of feeling between the witness and the deceased, before her death. The questions were objected to by the appellant, upon the ground that they were "irrelevant, and because it is matter which only tends to anticipate what seems to be a defence." The court overruled the objection, and the appellant excepted.

We think the objection should have been sustained. The state of feeling between a witness and a party to the suit in which he testifies, at or about the time of the trial, may be enquired into; but the state of feeling existing seven years before the trial, between the witness and the deceased, is clearly irrelevant. Yet the error was harmless; it can afford no ground for reversing the judgment. The evidence elicited was unimportant and wholly immaterial to the case. *Rothrock v. Perkinson*, 61 Ind. 39.

2. Similar questions were asked of the witness, McFarland, which may be disposed of in the same way, as being immaterial to the case and harmless to the appellant. The authorities are abundant, and need not be cited to show that a harmless error is not sufficient ground on which to reverse a judgment.

3. The court allowed the witness, John Davis, on behalf of the State, to testify, over the objection of the appellant, that a certain suit for divorce and alimony had been pending, wherein the deceased was plaintiff and the appellant defendant. This ruling is not erroneous. The pendency of a suit, the parties to it, and its subject-matter, may be proved by parol, where the record is not the ground of the action. In this case there was no offer to prove, and no evidence admitted tending to prove, the contents of the record, or any part of it.

4. The State was permitted, over the objection of the appellant, to introduce to the jury, as evidence, a subpoena caused to be issued by the appellant at a former trial, commanding the appearance of Sarah Vinson and Cathline Vinson, to testify on behalf of the appellant, and allowed several witnesses to give testimony tending to show that Jonathan W. Gordon, then one of the attorneys for the appellant, had a conference with these witnesses, at a place called the "Scraggy House." These rulings are complained of by the appellant, but we can not see that they are erroneous. Nothing was elicited as to the conversation of the attorney, Gordon, and the witnesses subpoenaed. Besides, we do not see how the appellant can complain of his own acts in causing a subpoena to issue, witnesses to appear in obedience thereto, and his attorney to confer with them on his own behalf. The evidence was useless to the case and harmless to the appellant.

5. The court gave to the jury, of its own motion, the following instruction :

"4. In determining what facts are proved in the cause, you should carefully consider all the evidence given before you, together with all the circumstances of the transaction in question, detailed by the witnesses during the trial. You may find any fact to be proved which may be rightfully and rationally inferred from the evidence given in the case."

This instruction is not incorrect. Inferences can not be drawn from inferences, nor will presumptions arise from presumptions; but inferences may be drawn from facts proved, and presumptions may arise from facts previously established. An illustration of this principle may be found in the case before us. The appellant was indicted for the murder of his wife, by shooting her with a pistol. Suppose a witness had testified that he saw the appellant and the deceased in close proximity; that the appellant held a pistol in his right hand; that he drew

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it upon his victim; that the witness saw him fire it off, and heard the report; that the wife immediately fell dead; that a gun-shot wound was found through her body, corresponding to the size of the bullet that would fit the pistol. Still, the fact that the bullet passed out of the pistol, through the air, into and through the body of the deceased, would be left solely to inference; for no eye saw it, and no sense took cognizance of it, yet the fact is as safely proved as the firing of the pistol, the gun-shot wound, or the death of the deceased.

The remarks of Chief Justice ABBOTT, in *The King v. Burdett*, 4 B. & Ald. 95, on p. 161, are so just and apt that we adopt them as our own:

"A presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained, by inference in a court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime, is or can be given; the man who is charged with theft, is rarely seen to break the house or take the goods; and, in case of murder, it rarely happens that the eye of any witness sees the fatal blow struck or the poisonous ingredients poured into the cup." See, also, Wharton Evidence, sec. 1226.

6. The court further instructed the jury as follows:

"12. Premeditated malice is where the intention to unlawfully take life is deliberately formed in the mind, and that determination meditated upon before the fatal stroke is given. There need be no appreciable space of time between the formation of the intention to kill and the killing. They may be as instantaneous as succes-

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sive thoughts. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation and premeditation on the part of the slayer."

In Wharton on Homicide, sec. 180, the text is as follows :

"There is a general concurrence of authority on the general meaning of premeditation. It involves a prior intention to do the act in question. It is not necessary that this intention should have been conceived for any particular period of time. It is as much premeditation, if it be entered into the mind of the guilty agent a moment before the act, as if it entered ten years before."

The following instruction in the case of *Beauchamp v. The State*, 6 Blackf. 299, was held good : "To constitute malice aforethought, it was only necessary that there should be a formed design to kill, and that such design might be conceived at the moment the fatal stroke was given, as well as a long time before; that malice aforethought means the intention to kill; and that when such means are used as are likely to produce death, the legal presumption is that death was intended." *Fahnestock v. The State*, 23 Ind. 231; *Keenan v. The Commonwealth*, 44 Pa. State, 55; *McKenzie v. The State*, 26 Ark. 334; *The State v. Dunn*, 18 Mo. 419; *The State v. Jennings*, 18 Mo. 435.

According to these authorities the twelfth instruction is not improper.

7. The court gave the following instruction to the jury over the objections of the appellant :

"15. If the evidence justify it, you may, upon this indictment, find the defendant guilty of murder in the first degree, or of murder in the second degree. If all the allegations of the indictment have been proved, you should

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find the defendant guilty of murder in the first degree.

- If all the allegations of the indictment, except the allegation of premeditation, have been proved, you should find the defendant guilty of murder in the second degree."

This instruction is imperfect, in not stating that the facts alleged in the indictment should have been proved beyond a reasonable doubt; but in several other instructions given on the court's own motion, and at the request of the appellant, the court instructed the jury that every material allegation in the indictment must be proved beyond a reasonable doubt, or they should acquit the defendant. These instructions, taken together, properly express the law. In such cases we think the rule should be as follows: An instruction which is contrary to law can not be corrected by another instruction on the same subject, which is according to law, unless the former be withdrawn. If both instructions were given to the jury, it could not be known which one they would accept and follow, and, in such case, the instructions being in conflict, the administration of justice would be rendered uncertain and insecure. But an instruction, which is merely imperfect because it does not fully state the law, yet states it correctly as far as it goes, may be completed by another instruction which supplies its defect. In such case the two instructions, not being in conflict, when taken together, fully state the law, and the jury can not be misled. *Achey v. The State*, 64 Ind. 56.

8. As it appears in the transcript, the court, at the request of the State, instructed the jury as follows:

"Mere words, however abusive or insulting, can justify the taking of human life. However great a provocation may be, if there be sufficient time after the provocation is offered for passion to subside, and for reason to interpose and assert her sway, the homicide, the other elements concurring, will be murder."

The context very plainly shows that there is a clerical omission of the word *not*, immediately after the word "can," in the first sentence of the above instruction; yet the appellant insists upon the error. Read literally, of course it is an error, but, being an error in favor of the appellant, he can not complain of it.

9. Upon request of the appellant the court refused to instruct the jury as follows:

"3. It is not sufficient that the circumstances proved coincide with and render probable the guilt of the defendant, but they must exclude, to a moral certainty, every other hypothesis but the single one of his guilt; or it is your duty to acquit the defendant."

Immediately before refusing the above instruction, the court had given the following:

"2. To authorize you to find the defendant guilty, as charged in the indictment in this case, the material facts proved must be susceptible of explanation upon no reasonable hypothesis consistent with his innocence."

This instruction covers the same ground as that included in the instruction refused, and we think is the better expression of the law. There is, therefore, no error in refusing the instruction numbered 3, of which the appellant can complain.

10. The court refused the following instruction, requested by the appellant:

"4. Although the shooting of the deceased can not be explained from the evidence, except upon the supposition of the defendant's guilt, you can not convict him for that reason."

This instruction, if indeed it expresses the law properly as it stands, a question we do not pause to decide, is fairly included in instruction numbered 2, which was given by the court upon request. It was, therefore, not error to refuse to repeat the same principle of law to the jury.

11. The court also refused to give the following instruction :

" 8. If, in making up your minds, from the evidence in this case, you have a rational doubt as to the existence of any of the material circumstances attempted to be proved by the State, that circumstance ought to be excluded by you, and have no influence upon your minds whatever in forming your opinion respecting the guilt or innocence of the defendant."

The substance of this instruction was several times given to the jury in the course of the series ; it was therefore not erroneous to refuse to give it again.

12. The following instruction was also refused :

" 9. The tracks of some person, attempted to be proved as leading to and from the window of the house where the deceased, Mrs. Binns, was at the time of the alleged shooting, is a material circumstance in this case, and if, from all the evidence in the cause, you have a reasonable doubt as to whether the defendant made these tracks, you should find the defendant not guilty."

This instruction was properly refused. It does not express the law. The guilt of the defendant did not depend solely on the identification of the tracks mentioned as made by the defendant, as is implied by the instruction. His guilt might have been established by other evidence without any reference to the tracks mentioned.

13. The court refused to give to the jury instructions numbered 10 and 12, at the request of the appellant. We do not set them out, but simply state the objections to them, which appear to us to be plain. Instruction numbered 10 is erroneous, because it assumes it to be proved, that the appellant made certain statements " when arrested and subsequently." Whether such statements were made, and what they were, were questions for the jury, and not the court, to decide. The instruction numbered 12 is

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erroneous, because it instructs the jury as to the weight to be given to certain testimony. This is also a question peculiarly for the jury, and must not be interfered with by the court in giving instructions.

14. The remaining question presented in the brief on behalf of the appellant (we can scarcely say that it has been argued) is as to the sufficiency of the evidence to support the verdict. It is all circumstantial, and so long, tedious and minute, that it is impracticable to state it in this opinion; nor can it be condensed and do justice to its accumulated weight; but we may state that, in our opinion, upon careful reading, it fairly supports the verdict, and falls within the rule laid down by the court in its instructions, and is also supported by the following authorities: *Beaver v. The State*, 58 Ind. 530; *Shepherd v. The State*, 64 Ind. 43.

We can find no ground of reversal in the record.

The judgment is affirmed, at the costs of the appellant.

CONRAD v. WILSON.

CHATTEL MORTGAGE.—*Sale of Mortgaged Goods on Execution.*—*Justice of the Peace.*—On the filing of an affidavit by the judgment creditor, alleging that delay in issuing execution will endanger the collection of his judgment, a justice of the peace may issue an execution thereon immediately on its rendition; and a sale, by a constable, on such execution, after due notice, of goods covered by a chattel mortgage, is not void.

RECORD.—*Exception to Rejection of Evidence.*—*Motion for New Trial.*—The fact that an exception was reserved to the rejection of evidence offered must be made to appear by the record; a mere allegation in the motion for a new trial, that such exception was reserved, not being sufficient.

From the Rush Circuit Court.

W. Cassady, J. Helm, Jr., and G. W. Spahr, for appellant.

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PERKINS, J.—Action to recover personal property, commenced before a justice of the peace.

Appeal to the circuit court, where the cause was submitted to the court and decided. The following is an agreed historical statement on which the cause is to be decided in this court:

“That, on the 5th day of March, 1874, the plaintiff in this case was sued by Uriah Thomas, on his, plaintiff's, promissory note, for the sum of \$171.46; that said suit was brought before one Robert N. Hinchman, a justice of the peace in and for Rushville township, and a summons was legally issued by said justice and served upon this plaintiff, John Conrad; that afterward, to wit, on the 9th day of March, at the hour of ten o'clock, the time named in said summons for the trial of said cause, the plaintiff, John Conrad, who was the defendant in the case at that time, failed to appear, whereupon judgment was rendered against said plaintiff, John Conrad, in favor of said Uriah Thomas; and upon the same day Uriah Thomas filed his affidavit with the justice, stating that said plaintiff, Conrad, was placing his property out of his hands for the purpose of defrauding his creditors, whereupon said justice issued execution in favor of said Thomas, and delivered the same to one George Gwinn, constable, who, on the tenth day of March, 1874, proceeded to take, and did take and levy upon, said property in controversy, by virtue of the execution aforesaid; and that afterward the said constable legally advertised and sold said property, under and by virtue of said execution, at public outcry, to the highest bidder, and this defendant, George Wilson, did then and there purchase said property in controversy, from said constable, for the sum of fifty-five dollars; and on the sixth day of March, 1874, on the day of the service of the summons aforementioned in the suit between Uriah Thomas and this plaintiff, John Conrad, the said Conrad,

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plaintiff, made and executed and delivered a certain chattel mortgage to his father, Reuben Conrad, upon this property in controversy, to secure the payment of a certain promissory note for the sum of \$800, payable December 25th, 1874, which mortgage was recorded legally and duly in Rush county, within the ten days from its date; and at the said sale of said property by the said constable, full notice was given by this plaintiff, to the defendant, of the existence of said chattel mortgage, and after the sale of said property and its delivery to this defendant, said plaintiff, John Conrad, who was the execution defendant at that time, demanded the surrender of this property, or to comply with conditions of this mortgage, or to pay the same to the mortgagee, Reuben Conrad, which said defendant refused to do; whereupon said execution defendant, John Conrad, the plaintiff in this case, replevied the same, and, on the trial of this cause, the plaintiff offered in evidence the chattel mortgage, a copy of which is filed herewith and made a part hereof, marked 'B,' made by John Conrad to Reuben Conrad, which the court refused to admit, which mortgage reads as follows:

“ ‘In consideration of the sum of eight hundred dollars in hand paid by Reuben Conrad, I have bargained and sold, and do hereby sell and convey, to the said Reuben Conrad, the goods and chattels mentioned in the schedule hereto annexed. In witness whereof I have set my hand and seal, this 7th day of March, 1874.

“ ‘JOHN CONRAD. [Seal.]

“ ‘Memorandum: My two horses, one cow, one two-year-old heifer, one yearling calf, wagon and harness, buggy and harness, nineteen head of hogs, and all my household and kitchen furniture, and all my property subject to execution, including twenty acres of growing wheat.

“ ‘The above mortgage is made to secure the said Reuben Conrad in a certain promissory note of this date.

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Now, if the said John Conrad shall punctually pay said sum of money, with the interest, when the same shall become due, then this conveyance shall become void, etc. John Conrad is to retain possession of said property till said debt becomes due, when on non-payment he is to re-deliver said property to said Reuben Conrad.'

"The mortgage was duly signed and acknowledged, and filed for record, March 14th, 1874, at 2 o'clock p. m."

This was all the evidence in the cause.

A motion for a new trial was overruled and judgment for the defendant entered. The grounds of the motion for a new trial were, finding contrary to law and evidence, and error of law on the trial, in refusing to admit the mortgage in evidence. Errors are assigned, that the finding was against the law and the evidence, and that the court erred in overruling the motion for a new trial.

The refusal to admit the mortgage in evidence was not excepted to. The statement in the overruled motion for a new trial is not evidence.

No effort was made to prevent the sale upon the execution. We think such sale was not void. 2 R. S. 1876, pp. 207, 683, secs. 436, 76.

And the mortgage upon the property not being in evidence, we see no reason presented why the purchaser should not have been allowed to take and retain possession.

The judgment is affirmed, with costs.

DEAN v. MILLER.

SLANDER.—Complaint.—Blank Dates.—Presumption of Jurisdiction in Circuit Court over Misdemeanor.—Innuendo.—Damages.—In an action for slander, the complaint alleged "that, at a term of" a certain circuit court of this State, "begun and held at" the proper place, "on the — day of —, —," wherein was pending a prosecution of this defendant, by the

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State, "for keeping and maintaining a gambling house," the plaintiff, being duly sworn, testified as a witness, on the trial, "touching the guilt of the defendant, and material to the issue joined therein"; that afterwards the defendant, "wickedly intending," etc., "in the presence of," etc., did "falsely and maliciously speak, of and concerning the plaintiff and his said oath and testimony in said cause, as aforesaid, the following false and slanderous words, to wit: 'You' (the plaintiff meaning) 'swore to a lie,' " etc.; "whereby the defendant meant to charge, and was understood by those who then and there heard said conversation to charge, that the plaintiff had committed the crime of perjury."

Held, on demurrer, that, as the act abolishing the common pleas court and conferring its jurisdiction over misdemeanors on the circuit court had gone into effect prior to the commencement of this action, the presumption is that such prosecution was begun at a time when the circuit court had jurisdiction.

Held, also, that it is sufficiently alleged that the slanderous declarations by the defendant were made concerning the plaintiff's testimony.

Held, also, that the words laid charged the defendant with perjury, without an innuendo.

Held, also, that the law implies damages from the speaking of such words.

PLEADING.—*Uncertainty*.—*Blank Dates*.—*Motion*.—*Demurrer*.—Where a pleading is blank as to material dates, objection must be made by motion to make certain, and not by demurrer.

From the Knox Circuit Court.

H. S. Cauthorn and J. M. Boyle, for appellant.

G. G. Reily, W. C. Johnson and W. C. Niblack, for appellee.

WORDEN, C. J.—Action by the appellee, against the appellant, for slander.

Demurrer to the complaint, for want of sufficient facts, overruled, and exception. Issue; trial; verdict and judgment for the plaintiff.

Errors are assigned upon the overruling of the demurrer, and of a motion for a new trial.

The complaint alleged, "that at a term of the Knox Circuit Court, begun and held at the city of Vincennes, in Knox county, in the State of Indiana, on the — day of —, —, a certain action was pending, wherein the State of Indiana was plaintiff, and this defendant was de-

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feudant, wherein the defendant was prosecuted for keeping and maintaining a gambling house, and that, on the trial thereof in said court, and in due course of legal proceedings therein, this plaintiff, being duly sworn, made oath and testified touching the guilt of the defendant in said cause, and material to the issue joined therein; and the defendant, wickedly intending to injure and defame the plaintiff's character, did afterward, in the presence of Dexter Gardener, William McChrisogen, and divers other citizens, falsely and maliciously speak, of and concerning the plaintiff and his said oath and testimony in said cause, as aforesaid, the following false and slanderous words, to wit: 'You' (the plaintiff meaning) 'swore to a lie. You' (the plaintiff meaning) 'swore against me' (the defendant meaning) 'what was not true. You (the plaintiff meaning) 'swore false against me' (the defendant meaning). Whereby the defendant meant to charge, and was understood by those who then and there heard said conversation to charge, that the plaintiff had committed the crime of perjury. Wherefore," etc.

It is insisted by the appellant, that, as the complaint fails to show when the prosecution was pending in the circuit court, in which the plaintiff was sworn and testified as a witness, or when that case was tried, it was bad, and that the demurrer to it should have been sustained.

The argument is, that, as there was a time when the circuit court had no jurisdiction of misdemeanors, viz., during the time the court of common pleas was in existence, that case may have been tried at a time when the court had no jurisdiction of it; in which event the words charged would not be actionable, as the plaintiff could not have committed perjury by testifying in a cause, over the subject-matter of which the court had not jurisdiction.

But the court of common pleas was abolished several years before this action was commenced, after which event

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the circuit court was vested with jurisdiction over misdemeanors. The case may be stated, then, as follows :

There was a time when the circuit court had jurisdiction over prosecutions for keeping a gambling house, and there was a time when it had no such jurisdiction. We are advised by the complaint, that, at some time not stated, that court took and exercised jurisdiction over such a case. What is the inference? Clearly, that the jurisdiction was exercised at a time when it was vested in the court, and not at a time when the court lacked the jurisdiction. The circuit court is a court of general jurisdiction, and, as was said by this court in the case of *The Board of Commissioners of Clay County v. Markle*, 46 Ind. 96, 106: "The rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged." It will therefore be intended that the circuit court had jurisdiction of the prosecution alleged. The omission in the complaint to state the time of the prosecution or trial, as mere matter of uncertainty, might have been remedied by motion, but was not reached by the demurrer.

It is also urged, as we understand the brief of counsel for the appellant, that the complaint is bad, because it does not contain a proper colloquium charging that the words were uttered and published "in a conversation of and concerning said trial." We think the complaint in this respect was sufficient. It is alleged that the words were spoken "of and concerning the plaintiff and his said oath and testimony in said cause as aforesaid." If the words were spoken "of and concerning" the plaintiff's testimony in said cause, the conversation must have been had "of and concerning" said cause and the trial thereof.

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Again, it is claimed that "the complaint does not contain the necessary innuendo, that by the speaking of the words charged the appellant meant, and was understood by those who heard them uttered, to charge that the appellee had committed the crime of perjury in the oath he took in the alleged judicial proceeding." We are of opinion that such innuendo was unnecessary.

"Where the libellous meaning is apparent on the face of the libel itself, innuendoes are unnecessary." Folkard's Starkie on Slander & Libel, sec. 442. The words here were not actionable without a statement of the extraneous matter showing their application, viz., the prosecution for the keeping of a gambling house, and the fact that the plaintiff testified as a witness upon the trial of the cause. But this extraneous matter having been stated, and it having been alleged that the words were spoken of the plaintiff's testimony upon that trial, the words became actionable, and it was unnecessary to allege that they were uttered or understood in an actionable sense. And when it was alleged that the words were uttered of the plaintiff's testimony in the cause mentioned, it sufficiently appeared that that was the cause in which he was charged with having sworn falsely.

The prefatory matter, thus alleged, sufficiently pointed to the meaning and application of the words. Townshend Slander & Libel, 3d ed., p. 180, note 2.

The complaint, in our opinion, was sufficient.

The reasons for a new trial were, that the damages were excessive, and that the verdict was not sustained by the evidence, and was contrary to law.

The amount of the verdict was five hundred dollars, and this we can not regard as excessive. *The Indianapolis Sun Co. v. Horrell*, 53 Ind. 527.

But the counsel for the appellant contend that "the law implies no damages in such cases, and leaves the party ag-

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grieved to show, by positive evidence, that he has sustained damages." There was no proof given of special damages; and if the above proposition be regarded as correct, the verdict and judgment can not be maintained. We are of opinion, however, that, as the words were spoken of the plaintiff's testimony on the trial of the cause mentioned, they carried with them the imputation of perjury; and that the law implies damage from the speaking of them, just as it would imply damage from a direct charge of perjury.

We think the case was fairly made out by the evidence, and find no ground for a reversal of the judgment.

The judgment below is affirmed, with costs.

LAUGHLIN ET AL. v. AYRES.

DITCHES AND DRAINS.—*Act of 1867.—Complaint to Collect Assessment.—Appraisers.*—In an action to collect an assessment for drainage purposes, made under the act of March 11th, 1867, 2 R. S. 1876, p. 684, the complaint must allege that the persons by whom the assessment was made were "disinterested freeholders of the county in which the application is made, and not of kin," etc.

From the Rush Circuit Court.

B. L. Smith, for appellants.

B. F. Davis and *J. E. Florea*, for appellee.

HOWK, J.—This was a suit by the appellants, against the appellee, for the recovery of an amount alleged to be due the former from the latter, on account of the construction of a certain ditch.

The appellee's demurrer to the appellants' complaint, for the alleged insufficiency of the facts therein to constitute a cause of action, was sustained by the court, and to

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this ruling the appellants excepted, and judgment was rendered against them, on the demurrer, for the costs of suit.

The appellants have here assigned, as error, the decision of the court below, in sustaining the appellee's demurrer to their complaint. The only question presented for our decision, by this alleged error, is the sufficiency of the facts stated in the complaint to constitute a cause of action.

In their complaint the appellants alleged, in substance, that, at the March term, 1874, of the Board of Commissioners of Rush county, Indiana, they presented their written petition to the board, for the construction of a ditch therein described, a copy of which petition they filed with their complaint; that, at said term, such proceedings were had by said board of commissioners, as that Samuel Green, Nelson Scisson and Levi M. Copeland were appointed to assess the benefits and damages arising from the construction of the contemplated ditch; that said parties last named were disinterested freeholders, not of kin to any party whose lands were affected by the construction of the proposed ditch; that, on the 30th day of March, 1874, the said viewers met at the commencement of said ditch, of the time and place of which meeting the appellee had been notified in writing more than ten days prior to said 31st day of March, 1874; that said viewers, on the 2d day of April, 1874, made their report of the assessment of benefits and damages to the several tracts of land described therein, and appended thereto their affidavit, that the same was a true assessment, to the best of their judgment and belief, and that the same was recorded on the 2d day of April, 1874, in the records of the recorder's office of said Rush county, a copy of which report was filed with the complaint; that the said viewers, by their report, assessed benefits to the amount of forty-five dollars to the appellee's

real estate, particularly described, in said county; that the appellants had completed the said ditch, according to the specifications of the application, on the — day of August, 1874; and that, on the 1st day of September, 1874, the appellants demanded payment of said sum of forty-five dollars from the appellee, but he had failed and refused to pay the same, and it was then due and unpaid. Wherefore, etc.

It is manifest from the averments of the appellants' complaint, that the proceedings therein mentioned and described, before the Board of Commissioners of Rush county, were intended and attempted to be had and held under and pursuant to the provisions of "An act to enable the owners of wet lands to drain and reclaim them," etc., approved March 11th, 1867. Acts 1867, p. 186; 3 Ind. Stat. 228; 2 R. S. 1876, p. 684.

In section 1 of this act it was provided, *inter alia*, that when a written application has been presented to the board of commissioners of the proper county, by any person, not a body corporate, interested in constructing any levee, drain, etc., "said board shall appoint three disinterested freeholders of the county in which the application is made, and not of kin to any of the parties, appraisers to assess the benefits and damages to any of such lands incident to said contemplated work." *Supra*.

In construing the provision of the statute above quoted, it has been held by this court, that, in an action brought to recover an assessment of benefits incident to the construction of a ditch or drain, the complaint must show by its averments that the assessment had been made by three disinterested freeholders of the county in which the application was made, and not of kin to any of the parties, as appraisers, and that, in the absence of such a showing, the complaint must be held bad, on a demurrer thereto for the want of sufficient facts. *Combs v. Etter*, 49 Ind. 535.

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In the case cited, as in the case at bar, the allegation of the complaint, on this subject, was, that the appraisers were three disinterested freeholders, and not that they were disinterested freeholders of the county in which the application was made, as the statute required they should be. The case cited was approved and followed by this court, on the point now under consideration, in the more recent case of *Seits v. Sincl*, 62 Ind. 253. See, also, the case of *Bate v. Sheets*, 64 Ind. 209, for a full statement of the law now in force in relation to drains and ditches.

For the reasons given, we are clearly of the opinion that no error was committed by the court, in this case, in sustaining the demurrer to the complaint.

The judgment is affirmed, at the appellants' costs.

HALL v. HARLOW ET AL.

PROMISSORY NOTE.—Agency.—Pleading.—Practice.—General and Special Verdict.—When Court may Assess Damages after Verdict.—Where the facts set out in a complaint upon a promissory note amount, in legal effect, to an allegation that one of the defendant makers, acting by and through the other defendant maker, as his agent, executed the note in suit jointly with said agent, a general denial by the former, of the complaint, not sworn to, only puts in issue the existence of the note; and an answer by the jury trying the case, to a special interrogatory, finding that the plaintiff had read in evidence a note purporting to be signed by both defendants, a copy of which had been filed with the complaint, is inconsistent with a general verdict in favor of the principal; and the plaintiff was entitled to have his damages assessed by the court, and to judgment for the amount thus found to be due upon the note.

SAME.—Supreme Court.—Defective Record.—Where it appears that the evidence is not in the record, and that no exception was reserved to any thing occurring at the trial, no question can be made in the Supreme Court, upon the general verdict.

From the Montgomery Circuit Court.

A. Thomson, B. T. Ristine, P. S. Kennedy and W. T. Brush, for appellant.

R. B. F. Peirce, for appellees.

NIBLACK, J.—This was a suit by James H. Hall, against Samuel Harlow and Garrett Harlow, on a promissory note.

The complaint was in two paragraphs. The first paragraph was withdrawn before the trial. The second paragraph was substantially as follows :

“ And for a second and further cause of action, the plaintiff complains of the defendants, and says that heretofore, to wit, on the 14th day of June, 1873, and for a long time prior thereto, the defendant Samuel Harlow, who is a son of his codefendant, Garrett Harlow, had been engaged in buying and selling cattle, sheep and other stock, and while so engaged he was accustomed to use, employ and sign the name of his said father in contracts relating to his said business, and did so use and sign the name of his said father, with the understanding and agreement existing between them at the time that he might so use the name and credit of his said father ; that the said Samuel Harlow was accustomed to sign the name of the said Garrett Harlow (who was then unable to write his own name), in contracts relating to his said business, and that he did so with the knowledge, approbation and consent of the said Garrett, he, the said Garrett, well knowing that the said Samuel was using his name and credit in said business ; that, at the date aforesaid, the said Samuel borrowed of the plaintiff the sum of six hundred and seventy-two dollars and fifty-eight cents, to be used in and about his said business, and did, for the same, execute the joint note of himself and the said Garrett, whereby the said defendants promised to pay the plaintiff the said sum of six hundred and seventy-two dollars and fifty-eight cents ; that on the 26th day of January, 1876, there was paid on

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said note the sum of two hundred and sixty-two dollars and forty cents, and a copy of said note is filed herewith, marked 'Exhibit A,' and made a part hereof; that the residue of said note is unpaid; and the plaintiff says the said Garrett has acknowledged the note aforesaid to have been executed with authority, and has ratified the act of the said Samuel in signing his name thereto." Wherefore judgment was demanded upon the note.

The defendant Samuel Harlow made default, and judgment was afterward rendered against him, for the balance due upon the note. Garrett Harlow, the other defendant, answered separately in general denial.

The issue thus formed was tried by a jury, resulting in a general verdict for the defendant, and an answer to a special interrogatory, as follows:

"Did the plaintiff read in evidence, to the jury, a note purporting to be signed by Samuel Harlow and Garrett Harlow, a copy of which is filed with the complaint?

"Answer. Yes."

The plaintiff thereupon moved for judgment in his favor, upon the answer to the special interrogatory, notwithstanding the general verdict, but the court overruled his motion and rendered judgment in favor of the defendant Garrett Harlow, upon the general verdict.

The plaintiff, who is the appellant in this court, has assigned for error, and as the only error, the overruling of his motion for judgment upon the answer to the special interrogatory, as above stated.

The appellant contends that, under the facts alleged in the paragraph of the complaint above set forth, the general denial, without oath, only denied the existence of the note sued upon, and that hence, upon the bare production of the note, he was entitled to have it read in evidence, without proof of its execution, and that, as the answer to the special interrogatory showed that the note had been read

in evidence to the jury, it necessarily followed that he was entitled to judgment upon the note.

We are of the opinion that the facts set out in the second paragraph of the complaint amounted, in legal effect, to an allegation, that the appellee Garrett Harlow had, acting by and through his son, Samuel Harlow, as his agent, executed the note in suit jointly with the said Samuel Harlow, and that the general denial of the said Garrett to said paragraph of the complaint, not being sworn to, only put in issue the existence of the note; but the evidence is not in the record, and no exception seems to have been reserved to any thing occurring at the trial. There is consequently nothing before us to indicate the theory upon which the cause was tried, or the peculiar circumstances under which the cause may have gone to the jury. No question is therefore made, or could be made, here, upon the general verdict.

The question recurs, Was the answer to the special interrogatory really and materially inconsistent with the general verdict?

We believe it was. The fair implication from this answer was, that the note set out in the complaint was in existence, and had been produced upon the trial, and such note having been read in evidence, we think the appellant became entitled to have his damages assessed upon it and to judgment for the amount found to be due upon such an assessment. Under such circumstances, the court would have been authorized to have assessed the damages. *Case v. Colter*, ante, p. 336; *Medler v. Hiatt*, 14 Ind. 405.

The case is a novel one in practice, and is, in our minds, not free from difficulty, but the conclusion we have reached seems to us to be fairly sustained by the analogies of the law, as recognized in other decided cases, and to afford the best possible solution of the very odd question presented for our consideration.

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The judgment in favor of the appellee Garrett Harlow is reversed, with costs, and the cause is remanded, with instructions to the court below to assess the appellant's damages upon the note read in evidence to the jury, and to render judgment in favor of the appellant, for the amount found to be due upon such note, against the said Garrett Harlow.

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OVERSHINER v. JONES.

TOWN.—Street Improvements.—Enforcement of Assessment.—Pleading.—In an action by a contractor, against the owner of a town lot in an incorporated town, to enforce an assessment thereon for a street improvement, the complaint must aver that the essential requisites of sections 8, 9 and 10 of the act of April 27th, 1869, 1 R. S. 1876, pp. 898 and 894, authorizing the trustees of such town to cause such improvement to be made, have been complied with.

SAME.—Contract for Improvement must be Written.—Acceptance of Bid by Trustees not a sufficient Contract.—Presumption.—Under the statute, the contract between the contractor and the town for the work contemplated by such improvement should be in writing; and when the complaint does not aver that it is in writing, and no copy thereof is filed with the complaint, it will be presumed that it was not in writing, and the complaint will, therefore, be insufficient. The parol acceptance, by the board of trustees of the town, of the written bid of the contractor for the work, is not such a contract as the statute requires in such cases.

SAME.—Averments as to Cost of Improvement.—Under section 9, *supra*, the contractor should aver in his complaint, for the purpose of showing that the requirements of the statute have been complied with, and that the defendant's lot has been charged with no more than its just proportion of the cost of the improvement, the facts in regard to such cost, the whole length of the improvement, the length of the defendant's front line thereon, and that the cost thereof has been estimated to the different lots or parcels of land bordering thereon, and the owners thereof, in the ratio prescribed by the statute.

SAME.—Variance.—Written, not Evidence of Parol, Contract.—Where, in a case of this kind, the contract declared upon for the want of an averment in the complaint to the contrary, is presumptively parol, the contractor's

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written bid and the written acceptance of the same by the board of trustees, constituting, if a contract at all, a written contract, are not competent evidence of the contract declared on.

SAME.—An acceptance of a bid which contains no agreement by the contractor to perform the work according to the specifications, is not a valid contract.

From the Madison Circuit Court.

C. L. Henry, for appellant.

Howk, J.—In this action, the appellee sued the appellant, in a complaint of but one paragraph, wherein he alleged, in substance, that on the 23d day of June, 1875, at a regular meeting of the board of trustees of the town of Elwood, in Madison county, Indiana, a petition, signed by a majority in number of the resident owners of lots and parcels of land bordering on that part of Main street to be improved, was presented to said board of trustees, asking for the improvement of Main street, from the place where Duck Creek crosses said street to the east end of the street, being more than one square in length, by the grading and gravelling of said street and sidewalks; that on the 3d day of August, 1875, at a regular meeting of said board of trustees, in pursuance of said petition, it was ordered by the board, that said street be improved by grading and gravelling the same, in a certain specified mode; that, before the letting of said work, notice was given by the clerk of said board for more than twenty days, by posting up written advertisements in five of the most public places in said town, that the board of trustees would receive bids for said improvement on the 31st day of August, 1875; that on the 24th day of August, 1875, the appellee made and delivered to said board his written bid to do said work, according to the specifications adopted by said board, at certain specified prices; that on said 31st day of August, 1875, the said board of trustees, at a regular meeting thereof then held, accepted and received the

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appellee's said bid, and awarded the contract to the appellee, according to the terms of his said bid, as the lowest and best bidder therefor; that thereupon the said board entered into a contract with the appellee to do said work according to the specifications adopted by the board, at the prices specified; that thereupon the appellee entered upon said contract in good faith, and entirely completed the same, according to the specifications adopted by the board; that the work was accepted by the civil engineer, and his written report made to said board, on the 15th day of November, 1875; that on the 29th day of December, 1875, the said board of trustees caused a full and final estimate to be made by said civil engineer, for said improvement, and on the 11th day of January, 1876, the said board, at a regular meeting thereof, accepted and received the said work, and ordered that the said estimate thereof should be paid over to the appellee, a copy of which order was filed with and made part of the complaint; that the appellee was the owner of a lot, particularly described, in said town of Elwood, and fronting sixty-six feet on that part of said Main street so ordered to be improved, and the amount of said work assessed against the appellant's said lot was sixty dollars and six cents; that, at each of the said meetings of said board of trustees, a quorum was present, when any action was had in regard to said street improvement; that the appellant had failed and refused to pay said assessment, for more than twenty days after the date of said estimate and demand having been made for the same, and more than ten days before the commencement of this suit, a copy of which estimate was filed with and made part of the complaint, and that the said assessment against the appellant's lot was then due and wholly unpaid. Wherefore, etc.

To this complaint the appellant demurred, upon the ground that the facts stated therein were not sufficient to

constitute a cause of action, which demurrer was overruled by the court, and to this ruling the appellant excepted, and then answered the complaint by a general denial thereof.

The issues joined were tried by a jury, and a verdict was returned for the appellee, assessing his damages in the sum of sixty-four dollars and forty-eight cents.

The appellant's motion for a new trial having been overruled, and his exception entered to this decision, judgment was rendered by the court, on the verdict, and from this judgment this appeal is now here prosecuted.

In this court, the appellant has assigned, as errors, the following decisions of the circuit court:

1. In overruling his demurrer to the appellee's complaint; and,
2. In overruling his motion for a new trial.

We will consider and decide the questions presented and discussed by the appellant's counsel, and arising under these alleged errors, in the order of their assignment:

1. The proceedings of the board of trustees of the town of Elwood, which constituted the basis of the appellee's alleged cause of action, were evidently intended to be had and held under and pursuant to the provisions of sections 8, 9 and 10 of "An act to enable incorporated towns to lay out, open, grade, and improve streets and alleys," etc., approved April 27th, 1869. 1 R. S. 1876, pp. 893 and 894.

These sections were very carefully considered by this court, in the case of *Anthony v. Williams*, 47 Ind. 565; in which case, in delivering the opinion of the court, BUSKIRK, C. J., said:

"In every case where an incorporated town seeks to improve the streets within its limits at the expense of the parties whose lots border upon the street, except in the

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case of a street 'around' the public square, there must be a petition signed by a majority of the property owners upon which to base the action of the board; there must be specifications sufficient to show the kind, and quantity, and location of the work to be done; there must be an advertisement for proposals to do the work; a contract to do the work according to the specifications must be entered into; the work must be done according to the contract, and the amount of the contract price therefor must be estimated to the different tracts of ground bordering on the street improved; and the board must require the owners of those tracts to pay the amount so estimated, and upon the failure or refusal of the owners of such lots or parcels of land upon which such estimates have been made, for the space of ten days after the date of such estimate, the contractors may immediately bring suit and recover, against the owners of such lots or parcels of land, the amount of such estimates. These are the essential requisites of the statute, and, in our opinion, should be substantially averred in the complaint; for otherwise there is no protection to owners of property in incorporated towns."

The doctrine of the case cited has been approved and followed by this court in the more recent cases of *Moore v. Cline*, 61 Ind. 113, and *Anthony v. Cooley*, 61 Ind. 323.

Upon the authority of the cases cited, it seems to us that the complaint in the case at bar must be held to be insufficient, on the demurrer thereto for the want of facts. There is no averment in the appellee's complaint, that the contract between the town of Elwood and the appellee, under which he claimed the street improvement was made, was a written contract. In the absence of such an averment, and where, as in this case, a copy of the alleged contract has not been filed with, nor made a part of, the appellee's complaint, we are bound to presume that the con-

tract is not in writing. *Harper v. Miller*, 27 Ind. 277; *The Logansport, etc., Railway Co. v. Wray*, 52 Ind. 578; *Krutz v. Stewart*, 54 Ind. 178. In regard to the requirements of the statute providing for the improvement of the streets in an incorporated town, it may be said that the statute does not, in express terms, make it necessary that the contracts for such improvements should be in writing. This is so, certainly, and yet the provisions of the statute which authorizes the improvement of its streets by an incorporated town are such that it is necessarily implied thereby and therefrom, that contracts for such improvements must be in writing. The statute which authorizes incorporated towns to improve their streets does not differ materially, in its phraseology and requirements, from the provisions of the general law for the incorporation of cities on the subject of street improvements; and it has been held by this court, that the contracts of such cities for the improvement of their streets must be in writing. *The City of Indianapolis v. Imberry*, 17 Ind. 175; *Moberry v. The City of Jeffersonville*, 38 Ind. 198.

If it could be said, that the parol acceptance of the appellee's written bid for the work, by the corporate authorities of the town of Elwood, was in any sense a contract in writing, still it would not be a contract, on the part of the appellee, to do the contemplated work according to the specifications adopted by the town trustees. For in his written bid, by the terms of which alone he would be bound in the absence of any other contract, the appellee made no reference whatever to any specifications, which had been adopted by the trustees of said town for the improvement of said street. It seems to us, therefore, that the appellee's complaint in this case is radically and fatally defective, on the appellant's demurrer thereto for the want of sufficient facts, in this, that it failed to show that the appellee had entered into such a contract with the board of

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trustees of the town of Elwood, for the improvement of Main street in said town, as the statute contemplates and requires in such cases.

We think, that the appellee's complaint was defective and insufficient on another ground. The statute provides that "the cost of any such improvement," as the one mentioned in the complaint, "shall be estimated according to the whole length" of the part of the street to be improved, "per running foot;" and "the owners of lots or parcels of land bordering on * * * * the part thereof to be improved, shall be liable to the contractors for their proportion of the cost of such improvement in the ratio of the first [front?] line of lots, or parcels of land owned by them, to the whole improved line." 1 R. S. 1876, p. 893, sec. 9.

It seems to us, that the appellee should have averred in his complaint, for the purpose of showing that the requirements of the statute had been complied with, and that the appellant's lot had been charged with no more than its just proportion of the cost of the improvement, the facts in regard to the cost of the improvement, the whole length thereof, the length of the appellant's front line thereon, and that the cost thereof had been estimated to the different lots or parcels of land bordering thereon, and the owners thereof, in the ratio prescribed by the statute. The complaint did not contain an averment of any of these facts; and for the want of such averments, or their equivalents, we think that the appellant's demurrer to the complaint ought to have been sustained.

2. Having reached the conclusion that the court erred in overruling the appellant's demurrer to appellee's complaint, it is hardly necessary for us to consider or decide any of the questions arising under the second alleged error, namely, the overruling of the motion for a new trial. Among the causes for such new trial, assigned by the appellant, was the insufficiency of the evidence to sustain the

verdict; and this cause, we think, was well assigned. No evidence was introduced of any such contract, between the appellee and the board of trustees of the town of Elwood, as the one described in the complaint for the improvement of the street therein mentioned. That contract, as we have seen, was presumptively a parol contract, under the allegations of the complaint. On the trial, the appellee gave in evidence his written bid for the work, wherein he proposed to the board of trustees of the town of Elwood "to grade Main street, according to stakes set by engineer," for certain specified prices, and the order of said board of trustees, from its record, accepting said bid, as follows: "It is ordered by the board, that the bid of J. Jones be accepted and the contract awarded to him." If these two items of evidence together constituted a contract, it was a contract in writing, and was not, therefore, the contract described in appellee's complaint. Nor was it such a contract as the statute required, in this, that the appellee did not bind himself therein to do the contemplated work, in accordance with the specifications adopted by the board of trustees. So that, in any view of the case, it seems very clear to us, that the appellee's evidence was utterly insufficient to show a valid, legal and binding contract between the appellee and the board of trustees, for the proposed street improvement; and, in the absence of such a contract, it is equally clear, we think, that the appellee did not have and could not acquire, under the terms of the statute, a legal demand against either the appellant or his lot, for any part of the cost of such street improvement.

Other questions, relating to the alleged insufficiency of the evidence, and to the errors, as claimed, of the court in its modification of certain instructions asked by the appellant, have been presented and discussed by his counsel, in their able and exhaustive brief of this cause; but, as they

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may not arise again, we deem it unnecessary for us now to extend this opinion, in the consideration and decision of those questions. The court erred, we think, in overruling the appellant's motion for a new trial.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the demurrer to the complaint, and for further proceedings in accordance with this opinion.



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ANGEVINÉ, ADMINISTRATOR, v. WARD, GUARDIAN.

GUARDIANSHIP.—*Final Settlement.*—*Judgment.*—*Appeal.*—To authorize an appeal from the final settlement of a guardianship, such settlement must be of such a nature as to fully discharge the guardian from his trust and all duties in regard thereto, and leave nothing to be done by him in his fiduciary capacity.

SAME.—*Bill of Exceptions.*—*Practice.*—*Supreme Court.*—*Record.*—Written exceptions to the reports of a guardian, and oral evidence adduced upon the hearing thereof, can only be made parts of the record by a bill of exceptions.

From the Dearborn Circuit Court.

R. Gregg, J. D. Parks, F. Adkinson and G. M. Roberts,
for appellant.

O. B. Liddell, for appellee.

NIBLACK, J.—During or about the year 1869, Isaac B. Ward was appointed, by the Court of Common Pleas of Dearborn county, guardian of the person and estate of James Angeviné, a person of unsound mind. The said Ward, from time to time, made reports of the condition of the said Angeviné's estate in his hands, to portions of which James A. Angeviné, a son of the said James Angeviné, filed exceptions. In July, 1874, the said James Angeviné

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died, and administration on his estate was granted to his said son, James A. Angevine.

At the April term, 1875, of the court below, the said Ward submitted what purported to be his final report as such guardian, and the said James A. Angevine, in his said capacity as administrator, filed exceptions to said final report, as well as to all previous reports.

After considering the various questions arising upon such reports and exceptions, the court, at the November term, 1875, made the following order :

“ Now, at this time, comes said guardian, and also comes James A. Angevine, administrator of the estate of James Angevine, deceased, and the matter of exceptions to the reports of said guardian being fully considered, and, after evidence being heard, the court permitted said guardian to amend his last report by the addition of certain items, and after said amendment said reports are in all things approved, and the exceptions of said administrator are not sustained ; and the court finds that said administrator has received from said guardian all the personal property in his hands, and for which he was accountable, excepting one feather bed and two pillows, seven comforts and blankets and one looking-glass, and that, by said report, there is now a balance of twenty-five dollars and eight cents, on the payment of which sum and the transfer of said personal property to said administrator, subject to the payment of all costs and expenses hereafter accruing, said guardian is fully discharged from his trust, and said guardian files with said reports receipts for all government bonds belonging to said estate and all silverware and watches directed to be transferred to said administrator, and said guardian also files the receipt of James A. Angevine for the sum of \$873.09, which includes and shows that he has fully paid all sums to which exceptions were sustained by decree in this matter of March 23d, 1875, as shown on pages 352 to 354 of Probate Order Book No. 9.

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"And the said administrator excepts and objects to the rulings of the court herein, and is granted thirty days to make and file his bill of exceptions, and he prays an appeal to the Supreme Court."

The said James A. Angevine, as administrator as above stated, and as appellant in this court, has assigned various errors upon the order of the court below, above set out. upon the theory that such order operated as a final settlement of the appellee's guardianship, and as a final discharge of the appellee therefrom.

Certain papers, purporting to be exceptions to the several reports made in this proceeding in the court below, are copied into the record. Certain verbal statements, in the form of oral testimony given by witnesses, are also copied into the record. But none of these papers or verbal statements were made a part of the record by any bill of exceptions, or by any order of court. They do not, therefore, constitute any part of the record, and are not before us for any purpose connected with this appeal.

A bill of exceptions was prepared and filed by the appellant, within the time limited by the court as above, but it did not include, or in any manner refer to, the exceptions and oral testimony copied into the record as above stated.

No question is, consequently, presented to us upon any of the supposed exceptions to the several reports submitted by the appellee, or upon any of the proceedings upon such supposed exceptions.

But it is insisted that the order of court, set out as above in this opinion, was not at all events a proper order of final settlement of the appellee's guardianship; that it operated as a premature discharge of the appellee from such guardianship, and that for these reasons, if for no other, it was erroneous.

In the case of *Dufour v. Dufour*, 28 Ind. 421, this

court, in passing upon the question of what constitutes a final settlement of a decedent's estate, which we regard as entirely analogous to the final settlement of a guardianship, says: "By the words 'final settlement,' as used in section 116 of the act, which it is there declared shall not be re-opened except by appeal, or for fraud or mistake, we do not understand the mere ascertainment of the final balance of cash in the hands of an executor or administrator.. We think that a payment of that balance is also included, so that nothing shall remain to be done by him in his fiduciary capacity, and he may be fully discharged from his trusts, as having completely performed them."

The order complained of impresses us as being an informal and imperfect order. It does not state any account with the appellee, and does not definitely refer to the items in the appellee's accounts intended to be either allowed or disallowed by it. But we are of the opinion that it was not in any proper sense an order of final settlement of the guardianship, and that it did not, in legal effect, discharge the appellee from such guardianship. By its terms, further duties in regard to his trust were devolved upon the appellee. If no further order has been made in the premises, the guardianship is still open and under the control of the court below.

For these reasons, we have come to the conclusion that the order under consideration did not constitute such a final judgment as authorized an appeal from it to this court, under section 550 of the code, and that the appeal will, in consequence, have to be dismissed. 2 R. S. 1876, p. 238.

The appeal is dismissed, at the costs of the appellant.

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PLEADING.—*Substituted Complaint on Promissory Note.—Copy.—Arrest of Judgment.—Waiver by Failure to Demur.—Complaint Cured by Finding.*—

In an action on a promissory note, wherein the defendant, without demurring, had joined issue on a substituted complaint, containing no copy of the note, he asked and was denied leave, after trial had commenced, to withdraw his answer and demur to such substituted complaint. His motion in arrest having been overruled, he appealed to the Supreme Court, there assigning as error the overruling of his motion in arrest, and also questioning the sufficiency of such complaint.

Held, the record showing that both the original and an amended complaint contained copies of the note, that the defendant, by failing to demur, had waived objection to the want of such copy in the substituted complaint, and therefore, as to that point, that such complaint was cured by the finding, and is sufficient.

From the Marion Superior Court.

J. S. Harvey and *G. W. Galvin*, for appellants.

T. H. Bowles, for appellees.

Howk, J.—This was a suit by the appellees, as indorsees, against the appellant George W. Galvin, as maker, and the appellant Albert Galvin, as the indorser, of a promissory note, of which the following is a copy, to wit:

“\$275. INDIANAPOLIS, IND., May 18th, 1876.

“Sixty days after date, I promise to pay to the order of Albert Galvin, negotiable and payable at the office of Woollen, Webb & Co.’s Bank, two hundred and seventy-five dollars, in the gold coin of the United States, with ten per cent. interest after maturity, value received, without any relief whatever from valuation or appraisement laws. If this note is paid at maturity, or before suit is brought thereon, then it shall be payable in any lawful money of the United States. The drawers and indorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note.

(Signed,) “GEORGE W. GALVIN.”

Indorsed: “A. GALVIN.”

To the appellees' complaint, the appellants jointly answered in four paragraphs, in substance as follows :

1. A general denial ;
2. Payment ;
3. That, at the time of the execution of the note in suit, and subsequent thereto, it was agreed, on the part of the appellees, to extend the time of the payment of said note, for a valuable consideration ; that said consideration was received by the appellees, and they then and since refused to extend said time, and that, by the terms of said agreement, the note was not due ; and,
4. The total failure of the consideration of the note in suit.

To the second, third and fourth paragraphs of answer, the appellees replied by a general denial thereof.

The cause, being at issue, was set for trial on a day certain, and on that day the appellants moved the court for leave to withdraw their answer, and to file a demurrer to the appellees' complaint. This motion was overruled, and to this ruling the appellants excepted and filed a bill of exceptions.

Thereupon the cause was tried by the court, at special term, and a finding was made for the appellees, for the amount of the note and interest, and judgment was rendered accordingly. The appellants' motion for a new trial was overruled, and to this decision they excepted and appealed to the court below in general term. On this appeal, the judgment of the court at special term was affirmed, and to the judgment of affirmance the appellants excepted and appealed therefrom to this court.

The appellants have here assigned, as error, the judgment of the court in general term, and this assignment brings before us the errors assigned by them, on their appeal to the court in general term. These alleged errors were as follows :

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1. The complaint did not state facts sufficient to constitute a cause of action ;
2. The court erred in overruling the appellants' motion for a new trial ; and,
3. Error of the court in overruling appellants' motion in arrest of judgment.

In their brief of this cause, the appellants' counsel say: "We ask that the judgment be reversed, on this one point, viz., the complaint upon which the pleadings were made up and trial had, is the substituted complaint, which purports to be on a note for \$275 simply. Nothing is alleged about the note being payable in gold coin, or without relief from valuation laws, nor about ten per cent. interest, and the note sued on is not made a part of the complaint; though a copy of it is said to be filed with the complaint, yet the transcript shows it was not done."

This is the only point made by the appellants' counsel in their argument of this cause, and on this point solely they ask us to reverse the judgment of the court below. It will be seen, from the errors assigned, that this point was not made by a demurrer to the substituted complaint, for the want of sufficient facts; but, after the appellants had answered said complaint, and after issue was joined on the answer by the appellees, and after the trial of the cause had commenced, the appellants, for the first time, objected to the sufficiency of the substituted complaint, upon the ground that a copy of the note in suit had not been actually filed therewith. At that time, at least two copies of said note were on file in this action. The transcript shows that a copy of the note was actually filed with the original complaint, and that another copy of the note was also actually filed with an amended complaint, subsequently filed. This latter complaint appears to have been afterward mislaid, and in lieu thereof the substituted complaint was filed, and it does not appear that any copy of the note was actually filed with this substituted complaint.

The question arises, and this is the only question in this case for our decision,—whether or not the appellants' failure to demur to the substituted complaint, for the want of a copy of the note actually filed therewith, was not equivalent to an express waiver of any objection to the sufficiency of the substituted complaint, on that ground? In other words, was not the defect in the complaint of such a character that it could only be reached by a demurrer for the want of sufficient facts, and that, in the absence of such a demurrer, it might be supplied by the evidence and cured by the verdict of the jury, or the finding of the court?

It seems to us that this question must be answered in the affirmative. The note in suit was accurately described in the substituted complaint by its date, its amount, and the names of its maker, its payee and its endorser, and we can not doubt that sufficient facts were stated in said complaint, so as to render the judgment thereon an absolute and complete bar to any other action on said note. In such a case, it is settled by the decisions of this court, that, although a copy of the note in suit and of its endorsement would be an indispensable part of a complaint thereon, on a demurrer thereto for the want of sufficient facts, yet, if there was no such demurrer interposed, after the verdict of a jury or the finding of a court thereon, such a defect in the complaint would be thereby cured, and the complaint, on a motion in arrest of judgment, or on the assignment in this court of its insufficiency as a cause of action, would be held to be sufficient, *Westfall v. Stark*, 24 Ind. 377; *Gander v. The State, ex rel.*, 50 Ind. 539; *Purdue v. Stevenson*, 54 Ind. 161; *Donellan v. Hardy*, 57 Ind. 393; *Wilson v. Kelly*, 58 Ind. 586; *Shaw v. The Merchants National Bank*, 60 Ind. 83; *Hostetler v. The State, ex rel.*, 62 Ind. 183.

We are clearly of the opinion, therefore, that although the appellees' substituted complaint, in this case, was so defective, for the reason that a copy of the note and of its

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indorsement was not actually filed therewith, that a demurrer thereto, for the want of sufficient facts, would have been properly sustained, yet, in the absence of such a demurrer, the defect was supplied and cured by the finding of the court thereon; and the court in general term, on the errors assigned therein, did not err in holding the complaint to be sufficient.

We find no such error in the record of this case, as would justify us in the reversal of the judgment of the court below in general term.

The judgment is affirmed, at the appellants' costs.

THE MARION AND MONROE GRAVEL ROAD CO. ET AL. v.
MCCLURE ET AL.

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GRAVEL ROAD ASSESSMENTS.—*Repealing Act of 1875.*—*Effect of Reviving Act of 1877.*—By the act of March 18th, 1875, Acts 1875, Reg. Sess., p. 80, all laws authorizing an assessment, or the collection thereof, for plank, macadamized or gravel road purposes in this State were repealed, and, therefore, assessments theretofore made under any previous act could not be collected while that act remained in force; but by the act of March 2d, 1877, Acts 1877, Reg. Sess., p. 72, the act of 1875 was modified to the extent that valid assessments, which had been made and placed upon the tax duplicate prior to March 18th, 1875, under the provisions of the act of May 14th, 1869, Acts 1869, Spec. Sess., p. 73, were authorized to be collected, in cases where the corporations had contracted debts on the faith of the assessments, and for that purpose, and to that extent only, said act of 1869 was revived.

SAME.—*Curative Act.*—Said act of 1877 was not intended to act as a curative statute, and does not authorize the collection of assessments which were void for non-compliance with the statute under which they were made.

SAME.—*Injunction.*—*Estoppel.*—*Pleading.*—*Notice.*—In a suit to enjoin the collection of certain void gravel road assessments, made more than two years prior to the passage of said act of 1875, an answer was filed setting up, by way of estoppel, that such assessments had been upon the tax duplicate for more than two years prior to the passage of said act of 1875, and that the plaintiffs, during that time, had instituted no proceedings to contest their validity, but had stood by and seen the defendant, during said time, perform work and contract debts upon the faith of such assessments, but it

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did not allege that the plaintiffs, during said time, had any notice of the facts rendering such assessments void.

Held, on demurrer, that the answer is insufficient.

From the Grant Circuit Court.

G. W. Harvey, A. E. Steele, J. Brownlee and H. Brownlee, for appellants.

G. T. B. Carr, I. VanDevanter and J. W. Lacey, for appellees.

WORDEN, C. J.—This was an action by Samuel McClure and numerous others, against the above named gravel road company and John P. Campbell, treasurer of Grant county, to enjoin the collection of certain assessments made in aid of the gravel road company.

The defendants answered in four paragraphs, the first of which was the general denial, and the second, third and fourth were of an affirmative character. Demurrers for want of sufficient facts were sustained to each of the affirmative paragraphs of answer, and exceptions taken. The defendants withdrew the general denial, and there was judgment for the plaintiffs, enjoining the collection of the assessments.

Error is assigned upon the rulings of the court upon the demurrers above mentioned.

It will not be necessary to an understanding of the questions involved that we should extend this opinion by setting out the complaint. It will be sufficient to state that the assessments are alleged to have been made in 1872, and numerous departures from the requirements of the statute, the act of 1869, in making the assessments, are alleged, which render the assessments void. Indeed, it is not disputed that the complaint was good.

Nor need we set out the second and third paragraphs of the answer, which were clearly not good, and are not seriously claimed to have been good by the counsel for the appellants, as we understand their brief, unless the act of

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1877, to be hereinafter noticed, shall be held to be curative of the defects in the assessments.

The fourth paragraph of the answer is as follows:

"For a fourth answer to the plaintiffs' complaint, the defendants say that the assessment of benefits to all lands within one and one-half miles of either side of said company's road, and within a like distance of either end of the same, procured to be made in favor of said company, and the collection of which the said plaintiffs seek to enjoin in this suit, was made by appraisers duly appointed by the board of commissioners of said county to assess the benefits to all such lands, upon a petition to said board of commissioners presented by the directors of said company, as required by the law, under and by virtue of which said company was organized, as set forth in the plaintiffs' complaint. That said assessment in favor of said company was made and given to the auditor of said county, who placed the same upon the tax duplicate for the year 1873, on the 15th day of January, 1873, and delivered to the treasurer of said county, on the 1st day of February, 1873, and that the tax duplicate containing the said assessment remained in the hands of said treasurer of said county, for collection, from said date until the 13th day of March, 1875, during all of which time the said treasurer was urging the collection of said assessment against the plaintiffs in this suit, and that said treasurer was threatening and about to collect said assessments, and that all of said plaintiffs knew that said assessments were placed upon the tax duplicate, and knew that said lands had been assessed with benefits resulting from the construction of said gravel road, and knew, at the time, that said treasurer was threatening and about to collect said assessments by distress and sale of property, and that said plaintiffs might have instituted proceedings at any time from the 1st day of November, 1872, to the 13th day of March, 1875, against said company, to enjoin the collection of said assessments, and that

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said plaintiffs did not institute any proceedings to enjoin the collection of said assessments, or any part thereof, but wholly neglected and refused to institute any suit to prevent the collection thereof; that, during the years 1873 and 1874, the directors of said company made contracts for grading and grubbing five miles of said company's road; that, during the year 1873, the said directors contracted debts for work and labor and materials done and furnished in the construction of said road, on the faith and belief that said taxes would be collected and used in defraying the expenses of constructing said road, to the amount of three thousand dollars, which said debt is still unpaid; that, during the year 1874, the said directors of said company contracted a debt of two thousand dollars for a like purpose, and with the expectation that the assessments would be collected and paid, and that said amount is still due and unpaid, and that the plaintiffs were duly apprised of all said facts, and during all said time stood by while said work was being prosecuted and made no objection, nor did they take or institute any proceedings to interfere with said proceedings, or give notice of their intention to do so; that, during all said time that said work was being done and said debts were being incurred, said plaintiffs and each of them knew that said taxes so assessed against their said lands were due and unpaid, and that the tax duplicate of said county containing said assessments was in the hands of the treasurer of said county, and that said treasurer was threatening to collect the same by seizure and sale of property; and they say that the uncollected taxes, so assessed against said plaintiffs, have been, by virtue and in pursuance of the act of the Legislature, approved March 2d, 1877, relating to the construction of gravel roads and reviving the act of May 14th, 1869, which was repealed by the act of the Legislature approved March 13th, 1875, declaring assessments upon lands for plank, macadamized and gravel road pur-

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poses in certain cases to be valid and binding, and providing for the collection and application of the same, revived and made valid and binding and legalized; the said directors of said company having made and filed with the auditor of said county the necessary petition as required by said act, and the auditor having placed the same upon the tax duplicate of 1878. Wherefore the defendants say that the plaintiffs are estopped from bringing this suit and obtaining the relief demanded in their said complaint," etc.

By the act of March 13th, 1875, Acts 1875, Reg. Sess., p. 80, all laws authorizing an assessment, or the collection of any tax or assessment, for plank, macadamized or gravel road purposes in this State, were repealed. See the case of *The State, ex rel., v. Stout*, 61 Ind. 143.

Had there been no subsequent legislation on the subject, the assessments in question could not have been collected, however regular they may have been, and however strictly the law under which they were made had been complied with. It was the evident purpose of the Legislature to abandon the system of enforced assessments against property supposed to be benefited by the construction of such roads, to aid in their construction, even where uncollected assessments had been regularly made and placed upon the tax duplicate for collection. *The Marion Township Gravel Road Co. v. Sleeth*, 53 Ind. 35.

But by the act of March 2d, 1877, Acts 1877, Reg. Sess., p. 72, this legislative policy was, to a limited extent, modified, and assessments which had been made and placed upon the tax duplicate, prior to the repealing act of 1875, were, in certain cases where the corporations had contracted debts on the faith of the assessments, authorized to be collected. The act of 1877 "revived" the act of 1869, under which the assessments were made, for the purposes and to the extent therein provided for; and it was provided that where assessments had been made and placed

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upon the tax duplicate prior to March 13th, 1875, "pursuant to the provisions of said act approved May 14th, 1869," the same might be collected in the cases and manner indicated.

Now, it is claimed by counsel for the appellants, that the act of 1877 operates as a *curative* statute, and renders valid assessments made prior to the repealing act of 1875, which were void or voidable for want of compliance with the provisions of the statute or statutes under which they were made. We, however, find nothing in the act that admits of such construction. There is nothing in the act that evinces such a legislative intent. The plain purpose of the act was to permit valid assessments, in the cases provided for, to be collected notwithstanding the repealing act of 1875, and not to validate and give life to assessments which were void, and which could not have been legally collected if the repealing act of 1875 had never been passed. Only such assessments are authorized to be collected as were made "pursuant to the provisions of said act approved May 14th, 1869." By this we understand that the assessments, in order to be rendered collectible, must have been made in accordance with, and not in contravention of, the provisions of said act of 1869.

We proceed to the fourth paragraph of the answer:

The counsel for the appellants urge that the matters alleged in this paragraph estop the plaintiffs to allege the invalidity of the assessments. Without considering whether the paragraph is otherwise good, we are of the opinion that it is fatally defective in the following particular: It does not appear from the paragraph that the plaintiffs, or either of them, from the time the assessments were placed upon the duplicate in 1873, up to the repealing act of 1875, and during the time the work was progressing and the debts being contracted, had any notice whatever of the facts alleged in the complaint, rendering

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the assessments void. They were guilty of no laches in not then instituting proceedings to contest the validity of the assessments, unless they had notice of the facts which would justify the contest, and can not, by such failure, be now estopped to make the contest. This we regard as well settled by the authorities. *The Greensburgh, etc., Turnpike Co. v. Sidener*, 40 Ind. 424. In *Maddy v. The Sulphur Springs, etc., Turnpike Co.*, 57 Ind. 148, it was held that a party who had given his note for an assessment in favor of a turnpike company, without notice of the invalidity of the assessment, might defend against the note on the ground of such invalidity. To the same effect is the case of *Parsons v. The Pendleton, etc., Turnpike Co.*, 59 Ind. 36. In *Long v. Anderson*, 62 Ind. 537, 543, this court said, Howk, J., speaking for the court, each of the paragraphs of answer was bad "for the reason that it was not alleged, in either of the said paragraphs, that the owner of said real estate was fully apprised of her legal rights, as such owner, to the saw-mill erected on said land, at the time she made the statements set up in each paragraph, which, it is claimed, would estop her from asserting her rights to said saw-mill."

There is no error in the record.

The judgment below is affirmed, with costs.

Petition for a rehearing overruled.

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CONTRACT.—*Statute of Frauds.*—*Memorandum, Reformation of.*—*Parol Evidence of Mistake Inadmissible.*—*Set-Off.*—In a suit upon account, for goods sold and delivered, an answer was filed alleging that the plaintiffs, H. Bros., by their agent, E. F. L., executed and delivered a written memorandum of

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goods they agreed to deliver to the defendants, A. P. L. & Bro., of which the following is a copy: "Terre Haute, Ind., —, 187—, A. P. L. & Bro." (Under this caption a list of the articles, with their specific and aggregate price, is given.) "Freight. Ship Emp. Line, 60 days' acceptance. [Signed,] H. Bros., per E. F. L., April 21st, 1875;" that said goods were not delivered to the defendants, by reason whereof they had been damaged in a certain sum; that said memorandum was written on a bill-head of the defendants, and by mistake the word "sold" was omitted from before the firm name of defendants. Prayer for a reformation of the memorandum, an offer to set off an amount of the damages equal to the plaintiffs' claim, and a demand for judgment for the residue.

Held, that the contract is within the statute of frauds, and that the memorandum is not a "note or memorandum in writing of the bargain," within the meaning of the statute.

Held, also, that parol evidence was not admissible to supply the omitted word in the memorandum.

BILL OF EXCEPTIONS.—*Filing of.*—*Practice.*—Where special leave beyond the term is not given by the court to reduce exceptions to writing, they can not be made part of the record by a bill of exceptions signed and filed at a subsequent term.

SAME.—*Must be Signed by Judge who tries Cause.*—Where a change of venue from the regular judge of a circuit is taken, and another judge is appointed to try the cause, who presides at the trial and renders judgment in said cause, he alone is authorized to sign any bill of exceptions therein.

DEPOSITIONS.—*Motion to Strike Out.*—Where a motion is made, as an entirety, to strike out a certain question and the answer thereto in a deposition, and some of the matter to which the motion is directed is free from objection and pertinent to the issues in the cause, it will be correctly overruled.

EVIDENCE.—*Delivery.*—*Sale.*—The delivery of goods pursuant to a written order for their shipment, and the quality and kind of the goods, can be proved by parol evidence.

From the Vigo Circuit Court.

R. Dunnigan, S. C. Stimpson, W. R. Stokes, G. W. Kleiser, J. H. Kleiser and E. E. Bassett, for appellants.

J. G. Williams, S. C. Davis and S. B. Davis, for appellees.

Howk, J.—This was a suit by the appellees, against the appellants, upon an open account, for personal property alleged to have been sold and delivered by the former to the latter, at their special instance and request. With their

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complaint, there was filed an affidavit on behalf of the appellees, to the effect that their claim was just; that the affiant believed they ought to recover a certain sum, the amount of their said account, the particulars of which were filed with their complaint, with legal interest thereon, and that the affiant was informed and believed that the appellants were about to sell, convey and otherwise dispose of their property, subject to execution, with the intent to delay and defraud the appellees out of their claim. With this affidavit, there was also filed in said court the proper undertaking, to the approval of the clerk, for an order of attachment against the property of the appellants.

To the appellees' complaint and their affidavit in attachment, the appellants answered in four paragraphs, of which the first was a general denial of the complaint; the second was a denial of the grounds for the attachment stated in said affidavit; and each of the third and fourth paragraphs set up affirmative matters, by way of recoupment or counter-claim.

The appellees' demurrer to the fourth paragraph of the answer, for the alleged want of sufficient facts therein, was sustained by the court, and to this decision the appellants excepted, and to the third paragraph of the answer the appellees replied by a general denial.

The issues joined were tried by a jury, and a verdict was returned for the appellees, assessing their damages in the full amount of the account in suit. The appellants' motion for a new trial having been overruled, and their exception saved to this ruling, judgment was rendered by the court, on the verdict, from which judgment this appeal is now prosecuted.

The appellants have here assigned, as errors, the following decisions of the court below :

1. In sustaining the appellees' demurrer to the fourth paragraph of their answer ;

2. In overruling their motion for an order for the inspection and copies of all letters, telegrams and postal-cards and other orders, relating to this action, written or sent by them to the appellees, and then in the possession of the appellees' attorneys; and,

3. In overruling their motion for a new trial.

1. In the fourth paragraph of their answer, the appellants alleged, in substance, that they were fruit merchants, doing business under the firm name of A. P. Lee & Bro.; that the appellees, by their agent, on the 21st day of April, 1875, executed and delivered a written memorandum of goods they agreed to deliver to the appellants, on the fastest freight line leaving the City of New York, which was the "Empire Line," a copy of which memorandum was filed with and made a part of said paragraph; that the appellees' agent made a mistake in writing said agreement, which was written on a bill-head of the appellants, and left out the word "sold," before their firm name at the top of said bill-head; that it was intended, understood and agreed, that said contract should be so executed, and the appellants said that they did not discover the mistake till some time after the appellees' agent had left the city of Terre Haute, where said contract was made; that, by the terms of said agreement, the appellees were to deliver to the appellants, in the city of Terre Haute, the goods therein named, on sixty days' acceptance, the same to be ordered at once and shipped by the "Empire Line," a corporation at that time shipping goods from the city of New York to the city of Terre Haute; that the appellants ordered the said goods, which the appellees refused to deliver to the appellants; that if the appellees had shipped the said goods as ordered, at the time they were so ordered, they would have arrived at the city of Terre Haute, on or about the 1st of May, 1875, at which time Prolema lemons were worth \$6 per box, and Messina lemons were

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worth \$7 per box; Messina oranges were worth \$4.50 per box, Prolema oranges were worth \$5 per box, Maple oranges were worth \$4 per box, and Imperial oranges were worth \$6 per box; that said agreement was written out by the appellees' agent, who make use of commercial abbreviations; these abbreviations, and what they mean, are then stated, and it is alleged that all of said abbreviations were so understood by the parties to said agreement; and the appellants averred that, by reason of the appellees' failure to ship and deliver the said goods, they were damaged in the sum of three hundred dollars. Wherefore the appellants prayed that said written memorandum might be corrected and reformed, by the decree of the court, agreeably to the intention, understanding and agreement of the parties, by inserting the word "sold" before their firm name of A. P. Lee & Bro. in said bill; and of their said damages they offered to set off an amount equal to the appellees' claim against them, and demanded judgment for one hundred dollars, the residue.

The following is the form of the memorandum in which the alleged mistake occurred, as the same appears in the record:

"Terre Haute, Ind.,———187 ,———A. P. LEE & BRO."

(Under this caption, there is a given list of the numbers of boxes of the different kinds of lemons and oranges, the price per box of each kind and the aggregate price of each kind, and closing as follows:)

"Freight. Ship Emp. Line, 60 days' acceptance.

(Signed,)

"HILLS BROS.,

"April 21st, 1875.

Per E. F. LOCK."

It is very clear, we think, that the alleged mistake in this memorandum can not be corrected, and the writing can not be reformed, in the manner asked for by the appellants in this action. In the fourth paragraph of their answer, the appellants allege that they had purchased of the appellees

certain goods, consisting of lemons and oranges, for the aggregate price of four hundred and ninety dollars, on a credit of sixty days. The appellants did not claim, that they had received any part of the goods so purchased by them, or that they had given something in earnest to bind the bargain, or in part payment, or even their sixty days' acceptance. Their alleged contract for the purchase of said goods from the appellees, therefore, comes fairly within the provisions of section 7 of "An act for the prevention of frauds and perjuries," etc., approved June 9th, 1852, and was invalid and of no binding force, "unless some note or memorandum in writing of the bargain" was made, and signed by the appellees, or by some person thereunto by them lawfully authorized. 1 R. S. 1876, p. 504. The memorandum counted upon in the fourth paragraph of the appellants' answer was not a "note or memorandum in writing of the bargain" which the appellants claimed they had made with the appellees. It is impossible to discover, from the terms of this memorandum, that any "bargain" had been made between the appellants and the appellees, of and concerning the goods therein mentioned and described. Nor can it be discerned, from the language used in said memorandum, if it be conceded that there was or had been a "bargain" by and between the said parties, and of and concerning the said goods, which of the said parties were the vendors or bargainors, and which were the purchasers or bargainees, of the said goods. If, as the appellants claim, the bargain by and between the parties was, that the appellees sold the said goods to the appellants, it is very certain that the memorandum, of which a copy was filed with and made a part of the fourth paragraph of the answer, was not a "note or memorandum in writing" of any such "bargain;" and if, as we may assume, the said memorandum was the only "note or memorandum in writing" relating to or connected with

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the alleged "bargain," made or attempted to be made by and between the said parties, it is equally certain, we think, that there was no note or memorandum in writing made of the alleged "bargain," and signed by the appellees, or by any person thereunto by them lawfully authorized, and that, for this reason, the alleged contract for the sale of said goods was invalid, illegal and of no binding force.

In the case of *Ridgway v. Ingram*, 50 Ind. 145, the requisites of the "note or memorandum in writing," referred to in the statute of frauds, were considered by this court; and in that case it was said by WORDEN, J., in delivering the opinion of the court, that "A memorandum, in order to be sufficient within the statute, must state the contract with such reasonable certainty, that its terms may be understood from the writing itself, without recourse to parol proof." In the case cited, the following statement of the law, upon the point under consideration, is quoted with approval from 2 Kent Com. 511: "Unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective, it can not be supplied by parol proof, for that would at once introduce all the mischiefs which the statute of frauds and perjuries was intended to prevent."

In 3 Parsons on Contracts, p. 13, it is said: "As to the question what the written agreement must contain, the general answer is, all that belongs essentially to the agreement, and more than this is not needed; nor can parol evidence be received to supply anything which is wanting in the writing, to make it the written agreement on which the parties rely." *Norris v. Blair*, 39 Ind. 90; *Baldwin v. Kerlin*, 46 Ind. 426.

In the case at bar, it is claimed by the appellants, that the memorandum, on which they rely in the fourth para-

graph of their answer, did not contain all that belonged essentially to the alleged contract between them and the appellees, in this, that it did not show that the appellees had sold the appellants the goods mentioned in said memorandum. It is further claimed, that the omission of the fact of sale from the memorandum was the result of mistake; but it is immaterial how the omission occurred, as it is very clear that, under the law, parol evidence could not be received to supply the omitted fact in the memorandum.

The court committed no error, in our opinion, in sustaining the appellees' demurrer to the fourth paragraph of the appellants' answer.

2. The second error, assigned by the appellants on the record of this cause, is the decision of the court below in overruling their motion for an order for the inspection and copies of all letters, telegrams, postal-cards and other orders, relating to this action, written or sent by them to the appellees, and then in the possession of the appellees' attorneys. The point is made by the appellees' counsel in argument, and we think it is well made, that this alleged error is not shown in or by the record of this cause, on file in this court. The entries in this cause on the order book of the circuit court, as the same are copied into the record, fail to show that the appellants made any such motion for the inspection and copies of all letters, etc., as stated in this assignment of error, or that any such motion was decided by the court, or that they excepted to any such decision. The only evidence of any such motion or decision or exception thereto, to be found in the record, is contained in what purports to have been a bill of exceptions in the case, and, as such, copied into the record. This apparent bill of exceptions was filed in the court below, on the 28th day of October, 1876, and it appeared to have been signed by the Honorable Chambers Y. Patter-

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son, the judge of said court, "on the 24th day of October, 1876, at the September term, 1876, of said court." It was recited in said alleged bill of exceptions, in substance, that the appellants made the aforesaid motion in the court below, at its April term, 1876, to wit, on the 10th day of June, 1876; that the court then and there overruled the said motion and refused to make the order moved for, and that the appellants at the time excepted to this decision. It did not appear, either in this pretended bill of exceptions or elsewhere in the record, that the appellants, at the time said motion was so overruled, or at any other time, either asked for or were granted "special leave of the court," beyond the term, "to reduce the exception to writing." In section 343 of the practice act, it is provided that "The party objecting to the decision must except at the time the decision is made; but time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the court." 2 R. S. 1876, p. 176. It seems to us, therefore, that, in the absence of any special leave of the court, giving the appellants time beyond the term to reduce their exceptions to writing, the decision of the court, at its April term, 1876, overruling the aforesaid motion of the appellants, and their exception to the decision, were not made parts of the record of this cause by the pretended bill of exceptions, signed and filed therein at the September term, 1876, of said court.

In another view of this question, we think that this pretended bill of exceptions did not become a part of the record of this cause. As we have seen, the decision of the court in overruling the said motion of the appellants was made at the April term, 1876, of the court, on the 10th day of June, 1876. The record shows, that at the said April term, 1876, of the court, on the 13th day of June, 1876, on the appellants' application, the venue of this cause was changed from Judge Chambers Y. Patterson, the reg-

ular judge of said court, on account of his alleged "interest and bias," and the "Honorable Solon Turman, Judge of the 13th Judicial Circuit of this State," was then and there duly called and appointed to try this cause. It is further shown by the record, that Judge Turman accepted such appointment, and on the trial of this cause, and when judgment was rendered therein on the 23d day of September, 1876, he was the judge of the court below. It seems to us, that after this cause was so removed from before Judge Patterson, and after Judge Turman, as judge of the court below, assumed jurisdiction of the case, Judge Turman alone was authorized by law to sign any bill of exceptions therein. Judge Patterson's connection with, or authority in or over, said cause was permanently dissolved.

For the reasons given, the second alleged error, in our opinion, is not apparent in the record.

3. Among the causes for a new trial, assigned by the appellants in their motion therefor, were certain alleged errors of law occurring at the trial and excepted to, in overruling their motions to strike out certain parts of certain depositions. It appears from a bill of exceptions in the record, that, on the trial of this cause, the appellees read in evidence to the jury the depositions of themselves, John Hills and William Hills; and that, after they had rested their case, the appellants called as a witness the appellant Chauncey B. Lee, who testified "that he resided in the city of Terre Haute, and plaintiffs resided in the city of New York; that the goods mentioned in the complaint were ordered by him, and that all the orders were in writing, and were sent by him through the mails to the plaintiffs." Upon this evidence, the appellants moved the court to strike out the following part of question 4, and the answer thereto, in each of the said depositions: "How and when were the goods delivered?" and the answer thereto as follows: "The articles were

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delivered, as directed by the defendants, either to the Empire Line or to the Baltimore and Ohio Railroad Company."

The reasons assigned for this motion were, that it then appeared from the evidence of said Chauncey B. Lee, "that the orders for the goods in controversy were in writing, and were the best and only proper evidence of the facts testified to by the plaintiffs." It seems to us that the court committed no error in overruling this motion of the appellants. The manner and the time of the delivery of the goods were facts which had an existence, if they existed at all, entirely independent of any written order, and as such they might be proved, without the production of the order, by any competent witness cognizant of such facts. The question objected to certainly did not, in terms, call for the contents of any written instrument, and was unobjectionable both in form and substance. The answers stated facts, which also existed, if at all, independently of any writing, with the exception of the expression, "as directed by the defendants." If the appellants had limited their motion to the striking out of the expression last quoted, from the answers of the deponents, the court would no doubt, and very properly, have sustained such limited motion. But the motion was an entirety, and some of the matter it was directed to was free from objection and pertinent to the issues in this cause, and, therefore, we think that the motion was correctly overruled.

Upon the same evidence, and for the same reasons, the appellants also moved the court to strike out the following part of the answers of the deponents to the 5th question, to wit: "They" (the goods) "were of the kind and quality ordered." It is very certain, we think, that the written order, if produced, would not have proved the fact as to "the kind and quality" of the goods actually delivered. This fact was outside and independent of the

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written order; for it often happens that there is a wide difference, as to "kind and quality," between the goods ordered and the goods delivered. If the written order was in evidence, the answers last objected to were material and pertinent; if the orders were not in evidence, the answers proved nothing, in regard to "kind and quality," and were entirely harmless. Certainly, the answers did not show the "kind and quality" mentioned in the written order, and did not give the contents of the order. The court did not err in overruling the motion to strike out the part objected to, of the answers to the 5th question.

These are all the questions discussed by the appellants' counsel, arising under the alleged error of the court in overruling the motion for a new trial. In our opinion the motion was correctly overruled.

The judgment is affirmed, at the appellants' costs.

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DRAINING ASSOCIATION.—*Personal Liability of Stockholders for Debts of.*—

Complaint.—In an action to recover, personally, from certain stockholders in a draining company, the amount of a judgment previously rendered in plaintiff's favor, against such company, for work and labor performed by the plaintiff for the company, an allegation in the complaint "that all of said defendants, together with this plaintiff, had signed the articles of association of said • • association, and were members thereof at the time of the performance of said labor, and at the time of the rendition of said judgment therefor," sufficiently shows that the defendants were members of the company at the time the debt in question was contracted.

SAME.—*Debt Contracted previous to Membership.*—A stockholder is not liable for debts of the company contracted before he became a member.

SAME.—*Fraud and Misrepresentation.*—In such case, a paragraph of answer setting up fraud and misrepresentation in procuring the defendants to become members of the corporation, but not in any way implicating the plaintiff in either, is no defence to the action.

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SUPREME COURT.—*Defect of Parties.—Practice.*—A point as to a defect of parties defendants can not be made for the first time in the Supreme Court.

SAME.—*Harmless Error.—Withdrawal of Pleading.*—It is a harmless error to sustain a demurrer to a paragraph of answer, when the matter of that paragraph can be given in evidence under the general denial, which is also pleaded; and the subsequent withdrawal of the general denial can not make the ruling materially erroneous.

From the Tipton Circuit Court.

D. Moss, for appellants.

J. Green, D. Waugh, J. Waugh and J. W. Robinson, for appellees.

WORDEN, C. J.—This was an action by Maranda, against the appellants, to recover from them personally, as stockholders in a corporation known as the Union Draining Association, for work and labor performed by the plaintiff, for the company. The action seems to have been based upon the 16th section of the act of 1869 on the subject of the construction of levees, dikes and drains, etc., 3 Ind. Stat. 222, which provides that "All members of any company which has been organized, or which shall be organized under the provisions of this act, shall be personally liable for all debts contracted by the company for manual labor performed for the company."

Judgment for the plaintiff.

Errors are assigned upon the rulings of the court in overruling a demurrer to the complaint, and in sustaining demurrers to the second, third and fourth paragraphs of answer.

The objection urged to the complaint is that it does not appear thereby that the appellants were members of the company at the time the debt in question was contracted.

The claim had been reduced to judgment against the company. There were two paragraphs in the complaint, each showing the insolvency of the company, in the first of which it was alleged "that all of said defendants, to-

gether with this plaintiff, had signed the articles of association of said Union Draining Association, and were members thereof at the time of the performance of said labor, and at the time of the rendition of said judgment therefor." The same allegation is found in the second paragraph.

We think the allegation above set out sufficiently showed that the defendants were members of the company at the time the debt in question was contracted.

It is also urged in the brief of counsel for the appellants that all of the members of the company should have been, but were not, made defendants to the action. No such point was made in the court below, either by demurrer or answer, and it cannot be made here for the first time.

The second and third paragraphs of the defendants' answer alleged, in substance, among other things, that the debt in question was contracted before the defendants became members of the corporation; and it is insisted that, because of these allegations, the demurrers to the paragraphs should have been overruled. If the appellants were not liable for the debts of the corporation contracted before they became members, which would seem to be the case (see *Williams v. Hanna*, 40 Ind. 535), the point made is a material one. But the allegations were but an argumentative denial of what the plaintiff was bound to prove under the general denial, which was filed, viz., that the defendants were members of the company at the time the debt was contracted. The matter thus pleaded could have been given in evidence under the general denial, and, therefore, it was not fatally erroneous to sustain the demurrer. To be sure, the general denial was afterward withdrawn, but its withdrawal could not make a ruling erroneous which was not so at the time it was made.

The fourth paragraph of answer sets up fraud and misrepresentation in procuring the defendants to become

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members of the corporation ; but the plaintiff is in no way implicated in either. We think it unnecessary to cite authorities to show that this is no defence to the action.

We find no error in the record.

The judgment below is affirmed, with costs.

ANGLE V. SPEER ET AL.

MORTGAGE.—Mistake.—When will not be relieved Against.—Sheriff's Sale.—

Where, in the execution of a mortgage, a mistake is made in the description of the land intended to be mortgaged, and such mortgage is afterward foreclosed and such mistake carried into the decree, order of sale, proceedings of the sheriff, his certificate, and the deed executed by such sheriff to the assignee of such certificate, the latter is not entitled to have such mistake corrected as against persons who claim under an intermediate deed and mortgage executed by the same mortgagor.

From the Decatur Circuit Court.

B. W. Willson, for appellant.

J. D. Miller, S. A. Bonner and J. L. Bracken, for appellees.

Howk, J.—This was a suit by the appellant, as plaintiff, against the appellees, as defendants, in a complaint of two paragraphs. As the only errors assigned by the appellant in this court call in question the sufficiency of the facts stated in each paragraph of the complaint to constitute a cause of action against the appellees John W. Anderson, Euphemia Hamilton, William M. Hamilton, William A. Donnell and Jane Donnell, and each of them, upon their demurrers thereto for the want of sufficient facts, we find it necessary to a proper understanding of the questions considered and decided, that we should give a summary, at least, of the matters alleged in each paragraph.

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In the first paragraph of his complaint, the appellant alleged, in substance, that on the 31st day of December, 1858, the appellee Joseph Speer was the owner of the following described real estate, to wit: Thirty-one acres off of the north end of the east half of the north-east quarter of section eight, and thirty-one acres off of the north end of the west half of the north-west quarter of section nine, all in town eleven, range eleven, in Decatur county, Indiana; that, being such owner of said real estate, said Joseph Speer borrowed of the appellee John S. Ross the sum of six hundred dollars, and executed his note therefor, dated December 7th, 1858, and payable twelve months after the date thereof to the order of said Ross; that to procure the loan of said sum of money from the said Ross, and to secure him in the repayment thereof, the said Joseph Speer and Ann Speer, his wife, in consideration of said loan, proposed to execute to said Ross a mortgage on said real estate; that, accordingly, the said Joseph and Ann Speer did execute to said John S. Ross a mortgage, to secure the payment of the said note, so given for the loan of said sum of money, copies of which note and mortgage were filed with the complaint as parts thereof; that, in the execution of said mortgage, a mistake was made in the description of the said real estate intended by the parties thereto to be mortgaged, so that, instead of the above correct description, the following incorrect description was made, to wit: Sixty-two acres off of the north side of the north-east quarter of section eight, town eleven, range eleven, in said Decatur county; and that the said John S. Ross, not knowing of said misdescription, accepted said mortgage, loaned the said sum of money, and caused the mortgage to be recorded. The appellant further averred, that on the 12th day of May, 1865, the said Speer executed to Luther A. Donnell a mortgage on the east half of the north-east quarter of said

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section eight, which was duly recorded in the recorder's office of said Decatur county, to secure certain judgments therein mentioned, which mortgage was duly foreclosed, and said real estate sold and purchased by Jane and William A. Donnell and Euphemia Hamilton, the widow and heirs of said Luther A. Donnell, who had died after the execution of the mortgage to him; that on the 31st day of January, 1867, the said Joseph and Ann Speer executed and delivered to said Luther A. Donnell and one John S. Anderson a deed conveying to them, by quitclaim, certain real estate particularly described, in said sections 8 and 9, containing 62.37 acres, which deed was duly recorded, and a copy thereof set out in said complaint. And the appellant further averred, that at the August term, 1869, of the Court of Common Pleas of said Decatur county, the said John S. Ross foreclosed his said mortgage, and thereby carried forward into the decree and judgment the same misdescription of the mortgaged premises, and recovered judgment against said Joseph Speer for the sum of \$1,034.67; that on the 31st day of May, 1870, an order of sale was issued on said foreclosure and judgment, under which, on the 2d day of July, 1870, the said real estate was sold, by the same misdescription, to said John S. Ross, for the sum of \$800.00, which was more than the full value of the real estate intended to have been sold; that a certificate of such sale was issued by the sheriff of said county to said John S. Ross, which certificate the said Ross, on the 24th day of February, 1872, for value received, sold and assigned to the appellant, a copy of which certificate and of the assignment thereof was made part of the complaint; that the appellant had no knowledge of said misdescription, but, on the contrary, believed that by said certificate he would be able to perfect title to said real estate in himself, and that he paid said Ross, for the assignment of said certificate, the sum of ——— dollars, which was the full

value of said real estate ; and that afterward, on the 14th day of March, 1878, the sheriff of said county executed to the appellant a deed, in pursuance of said certificate and of said assignment thereof, a copy of which deed was filed with and made part of said complaint.

And the appellant further averred, that on the 31st day of January, 1867, the said Joseph and Ann Speer, as before alleged, at the request of said Luther A. Donnell and John S. Anderson, executed to them a deed of said real estate ; that said grantors (grantees ?), at that time and before, knew of said misdescription, and procured the making of said deed, for the purpose of defeating the lien intended to have been created on so much of said real estate as was situated in said section nine ; and that, since the execution of said deed to said Luther A. Donnell and John S. Anderson, both said grantees had died, the said Donnell leaving as his heirs the appellees William A. Donnell and Euphemia Hamilton, intermarried with Wm. M. Hamilton, and the said Anderson leaving the appellee John W. Anderson as his sole heir. Wherefore the appellant prayed that he might be subrogated to all the rights of said John S. Ross, and that the decree and judgment in his favor might enure to the appellant's benefit ; that the said mistake might be corrected and that the said judgment and foreclosure might be reformed, to the end that the real estate first described, and which was intended to be covered by said mortgage to said Ross, might be subjected to sale for the payment of the claim of said Ross, so assigned to the appellant, and that all the appellees might be perpetually enjoined from all interference with said real estate, and that the title be granted to the appellant.

The allegations of the second paragraph are substantially the same as those of the first paragraph of the complaint.

The question presented for our decision, in this case,

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may be stated thus: Has the appellant, in either paragraph of his complaint, stated a case which would entitle him, as against the appellees, to the correction of the alleged mistake in the mortgage from Speer and wife to John S. Ross, in the judgment and decree of the Decatur Court of Common Pleas foreclosing said mortgage, in the order of sale issued on said judgment to the sheriff of Decatur county, in the proceedings of said sheriff, under said order of sale, in the advertisement and sale of the mortgaged premises, in the certificate of sale issued by said sheriff to said John S. Ross, and in the sheriff's deed to the appellant, in pursuance of said certificate and the said assignment thereof? It seems to us that this question must be answered in the negative. Indeed, under the decisions of this court, the question can hardly be regarded now as an open one in this State. The case of *Rogers v. Abbott*, 37 Ind. 138, was very similar, in the facts alleged and in the relief sought, to the case at bar. In the case cited it was said: "It is quite evident that the facts alleged plead very strongly for the interposition of judicial authority in the correction of the mistake in the description of the land. * * * * The difficulty arises out of the facts that the judgment directing the sale of the ten acres of land, and the advertisement, appraisement, if any was made, and the sale and conveyance thereof by the sheriff each designated and described another piece or tract of land than that intended, and of which possession was taken. * * * * If the mistake was in the deed only, perhaps it might be corrected in this way. *Johns v. De Rome*, 5 Blackf. 421. But if we should correct the deed, and attempt to vest in the plaintiff the title to the tract of land which he claims, we should give him land which was not ordered by the court to be sold, nor advertised by the sheriff, nor sold by him, nor purchased by the plaintiff."

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To the same effect was the decision of this court in the case of *Miller v. Kolb*, 47 Ind. 220 ; in which case it was held that "when, during the transfer, a judicial sale intervenes, and the error" (in description) "is carried into the judgment, the order of sale or execution, the advertisement, the appraisement, the sale, and the sheriff's deed, equity cannot give relief by ordering a correction of the description of a subdivision at the suit of the purchaser at the sheriff's sale, or those claiming under him."

In the case of *The First National Bank of Centreville v. Gough*, 61 Ind. 147, it appeared that the appellee Charles T. Gough had been the owner of 94 acres of land in the south-east quarter of section 21, township 16 north, of range 12 east, which was known as the "Home Farm ;" that, being such owner, the said Gough and his wife had mortgaged the said land by an imperfect description, to the appellant, to secure a certain note ; that, after the execution and record of said mortgage, the said Gough made an assignment of said real estate, with his other property, to certain named persons, for the benefit of his creditors ; and that, after such assignment, the appellant had foreclosed its said mortgage, without having the same reformed and the mistake therein corrected, and without making the assignees of said Gough parties defendants to the action. After such judgment of foreclosure, the appellant brought an action against the mortgagors and said assignees, to obtain a reformation of the mortgage and judgment, and the correction of the mistake therein, alleging in its complaint, that the misdescription of the mortgaged premises occurred through "the inadvertence and mistake of the parties, and of the scrivener who drew the mortgage." On demurrer to this complaint, it was held by this court, that the alleged mistake was the result of negligence on the part of the mortgagee, and that, "To entitle a party to relief * on the ground of mistake, in a case

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free from fraud, the mistake must be: 1. As to a material fact, constituting the very essence and condition of the contract. 2. The mistake must be of a fact of such a nature, that the party could not by reasonable diligence get knowledge of it, when put upon inquiry. 1 Story Eq. Juris., sec. 146." *Taylor v. Fleet*, 4 Barb. 95.

It seems to us, that the doctrine of the cases cited herein from our own Reports is decisive of all the questions in the case now before us, adversely to the appellant. The court committed no error, in our opinion, in sustaining the appellees' demurrers to either paragraph of the appellant's complaint.

The judgment is affirmed, at the appellant's costs

WILES v. LAMBERT.

PRACTICE.—Demurrer waived.—Amendment.—Where, after a demurrer has been overruled to a pleading, an additional paragraph is filed, containing the same averments, a failure to demur thereto renders the ruling on such demurrer harmless.

SAME.—Uncertainty in Pleading.—Demurrer.—Motion.—Uncertainty in a pleading is reached, not by demurrer, but by motion to make certain.

SAME.—Special Demurrer at Common Law.—Under the practice act, a motion to make certain takes the place of, but is somewhat broader than, a special demurrer at common law.

SAME.—Defective Complaint Cured by Verdict.—Under section 580 of the practice act, many defects in a pleading are cured by verdict.

SAME.—Defects in Complaint Aided by Answer.—In an action to enjoin the sale of land on execution, an insufficient description, in the complaint, of the judgment on which the execution was issued, is cured by an accurate description thereof in the answer.

SAME.—Presumption Sustaining Instruction.—Supreme Court.—Where, on appeal to the Supreme Court, the evidence is not in the record, but, under the issues, evidence might have been given to which the instructions would have been applicable, the presumption is that such evidence was given.

From the Huntington Circuit Court.

W. H. Trammel, for appellant.

J. C. Branyan and C. W. Watkins, for appellee.

PERKINS, J. — The appellee sued the appellant, the sheriff of Huntington county, to obtain an injunction upon the sale of certain real estate upon which he had levied executions.

No objection, by motion or demurrer, was taken to the complaint.

Answer. No objection was taken thereto.

Reply in one paragraph.

Demurrer thereto overruled, but the defendant thereupon filed, by leave of the court, a second paragraph of reply, covering the allegations made in the first and also making additional allegations, to which no objection was taken, so that the ruling on the demurrer to the first paragraph became unimportant.

Trial by jury; verdict for the plaintiff; motion for a new trial overruled; and judgment on the verdict. Appeal to this court, where the following assignment of errors is made:

1. The complaint does not state a cause of action;
2. The first paragraph of reply was bad;
3. The second paragraph of reply was insufficient;
4. The court erred in overruling the motion for a new trial.

We consider the assignments of error.

The complaint was open to a motion for greater certainty, and perhaps would not have been held good on demurrer. *Trueblood v. Hollingsworth*, 48 Ind. 537.

Section 90 of the code of pleading and practice is as follows:

“In the construction of a pleading for the purpose of determining its effects, its allegations shall be liberally construed with a view to substantial justice between the parties; but when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment.”

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A motion for such amendment takes the place, under the code, of a special demurrer at common law, and is, perhaps, somewhat broader in its scope.

But though the complaint in this case might have been bad on demurrer, it is good after verdict.

Section 580 of the code, 2 R. S. 1876, p. 246, declares that :

“No judgment shall be stayed or reversed, in whole or in part, by the Supreme Court for any defect in form, variance or imperfections, contained in the record, pleadings, process, entries, returns or other proceedings therein, which by law might be amended by the court below; but such defects shall be deemed to be amended in the Supreme Court; nor shall any judgment be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below.”

Under this section, especially the last clause of it, many defects are held to be cured by verdict. *Scott v. Zartman*, 61 Ind. 328.

But in this case we need not rely upon the above section of the statute. The material defect in the complaint was, that the judgments on which the executions in the hands of the sheriff issued were not sufficiently described to show their validity; but the answer of the defendant set them all out, accurately and fully, and, in addition, made copies of them exhibits, etc. Thus, the defect in the complaint was substantially aided by the subsequent pleading. 1 Chit. Pl. 703; *Watkins v. Gregory*, 6 Blackf. 113, and cases cited in note 1, appended to that case.

What we have said disposes of the first three assignments of error.

The fourth is the overruling of the motion for a new trial. The legal grounds assigned in the motion for a new trial were :

1. Verdict contrary to the law and the evidence;

2. The court erred in giving the two instructions asked by the plaintiff.

The evidence is not in the record. There is nothing in the record showing that the judgments on which the executions mentioned, and the sale upon which was sought to be enjoined, were ever signed by the court. See *Bicknell Civil Pr.*, p. 304; 2 R. S. 1876, p. 10, sec. 22.

In the absence of the evidence, we cannot say that the verdict was contrary to the evidence and the law.

It is doubtful if the ground of error in giving instructions is not too general to be noticed; but we copy the instructions:

"1. If the jury believed, from the evidence, that the plaintiff, Lambert, had bought the land in good faith, before the 11th day of January, 1876, and had entered into possession of the same, although he may not have had a deed for it, and that he still owned the same at the time this suit was commenced, then they must find for the plaintiff.

"2. A deed is delivered when the same is handed into the recorder's office for record, provided the party to whom the deed is made directs the same to be left there for him."

Exceptions were entered. See 1 R. S. 1876, p. 367, sec. 29. The facts of the case, as shown in evidence, might have been such that, as applicable to them, the instructions given would have been correct. *Jackson v. Snell*, 34 Ind. 241; *Taylor v. McClure*, 28 Ind. 39; *Fewell v. Kessler*, 30 Ind. 195.

The judgment is affirmed, with costs.

ON PETITION FOR A REHEARING.

SCOTT, J.—It is intimated in the original opinion in this case, that "perhaps" the complaint "would not have been held good upon demurrer." The appellant, in the petition

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for a rehearing, makes this point: That there was a demurrer to the reply and this demurrer was overruled, and that, as the demurrer brings in review all the pleadings, it ought to have been sustained to the complaint. But, upon a re-examination of the complaint, we are of the opinion that the complaint was good.

The petition for a rehearing is therefore overruled.

Original opinion filed at May Term, 1879.

Opinion overruling petition for a rehearing filed at November Term, 1879.

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THE HOWE MACHINE COMPANY v. REBER.

PROMISSORY NOTE.—Contract.—Counter-Claim.—Exchange of Chattels.—In a suit upon a promissory note, a counter-claim was filed, alleging that the note in question was executed by the defendant for the difference between a sewing machine of a certain value which he had traded to the plaintiff, and a higher priced machine which he had obtained in said trade, and that the plaintiff, contrary to its agreement made at the time of such trade, had refused to repair said machine, which had proved worthless, or to give him another and a good one in its place.

Held, on motion in arrest, that the counter-claim is sufficient.

SAME.—Measure of Damages.—Fraud.—Warranty.—In such case, the defendant would be entitled to recover only the actual damages sustained by the breach of the contract. Neither fraud nor warranty entered into the case. If he still retained the machine, and the same could be repaired so as to work according to contract, then the measure of his damages would be the cost of the repair, which he would be entitled to have deducted from the note; but if the plaintiff never refused to repair the machine, on request, or was never requested by the defendant to furnish a new one, the plaintiff would be entitled to recover on the note.

SAME.—Conditional Sale.—Departure in Instructions.—An instruction to the jury trying such case, treating the alleged contract for the exchange of such chattels as a conditional sale, was a departure, and erroneous.

INSTRUCTIONS.—Must be relevant to the Issues.—The instructions of the court to a jury trying a cause must be relevant to the issues therein.

From the Cass Circuit Court

M. Winfield, for appellant.

Howk, J.—In this action, the appellant sued the appellee,

in a complaint of two paragraphs, each counting upon a promissory note executed by the appellee to the order of the appellant, and each alleged to be due and unpaid.

To the appellant's complaint, the appellee answered in four paragraphs, in substance as follows :

1. Payment in full before the commencement of this suit.

2. That the notes in suit were given without any consideration.

3. The appellee said, in answer to the second paragraph of the complaint, that he admitted the execution of the note set out in said paragraph, but said that the consideration thereof had wholly failed, in this, that at the time of the execution of said note, and as the consideration thereof, the appellee received from the appellant a certain sewing machine, which, the appellant said, was in good order and perfect in all its parts and machinery; that, if it did not do good work, the appellant would have it repaired and made to work properly and to the satisfaction of the appellee, or put in another machine of the same price and pattern, that would work right; that the machine was not properly constructed and was imperfect in its machinery, and that the appellant had failed and refused to have the same repaired or corrected; that said machine was so imperfect as to be of no value at all for the purposes for which it was intended, and for which the appellee purchased it, and the appellant has refused to furnish the appellee a good machine in its place, as it agreed to do; that, at the time the appellee purchased said machine, he relied on the promises and representations of the appellant and its agent, that if the machine should not work properly, they would repair it or furnish the appellee another, which they had failed to do. Wherefore the appellee said, that the consideration for said note had wholly failed, and as to so much of its cause of action the appellant ought not to recover.

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4. By way of counter-claim to the second paragraph of the complaint, the appellee admitted the execution of the note set out in said paragraph, and said that he was the owner of a Howe sewing machine, which was in good running order and of the value of fifty-five dollars; that the appellant, by its agent, was desirous of trading to the appellee a higher priced Howe machine, and did exchange machines with the appellee, taking from him the note in suit for the difference, which the appellant represented there was between the machines; that the appellant, by its agent, represented the machine received by appellee to be in good running order and perfect in all its parts; that, if it were not so, the appellant would have it fully repaired, and readjusted, so as to do any and all kinds of sewing for the appellee's family, or, if the machine could not be made to do good work, the appellant would take it away, and in its place give the appellee one of the same pattern and price, that would be in good order; that the appellant further agreed to furnish the appellee, as a part of the consideration of the trade, certain attachments, to wit, one embroider and tucker, of the value of seven dollars and fifty cents; that the appellee, relying upon the representations and promises of the appellant, that the machine was perfect and in good order, or, if not so, the appellant would cause it to be so made or furnish him another and good machine, and would furnish the aforesaid attachments, delivered to the appellant the machine he then had, and executed the note set out in the second paragraph of the complaint, and received from the appellant the high-priced machine; that said machine was so imperfect, that it did not then, nor had it since been repaired by the appellant so that it would, do any kind of sewing; that the appellee had often requested the appellant to have the machine repaired, and at one time sent it to the shop for that purpose, but that it was in no better order when it was returned, than when he sent it; that he had

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notified the appellant, that the machine was not a perfect one and had requested the appellant to deliver him a perfect one, as agreed by the parties, which the appellant had failed and refused to do; that the appellant had never furnished the attachments, as agreed, although often requested so to do; that the machine furnished the appellee was of no value whatever; and that, by reason of the appellant's failure to fulfil its promises and agreements, the appellee had been damaged in the sum of seventy-five dollars, for which he demanded judgment.

To the appellee's answer, and each paragraph thereof, the appellant replied by a general denial. The issues joined were tried by a jury, and a general verdict was returned for the appellee, assessing his damages in the sum of thirty-two dollars and fifteen cents. With their general verdict, the jury also returned their special findings on particular questions of fact, submitted to them by the parties under the direction of the court; but, as no question is presented to this court in regard to the special findings, we need not set them out in this opinion.

The appellant's motions for a new trial, and in arrest of judgment, in the order named, having each been overruled, and its exceptions entered to these decisions, judgment was rendered for the appellee on the general verdict, from which judgment this appeal is now here prosecuted.

In this court, the appellant has assigned, as errors, the following decisions of the court below:

1. In overruling its motion for a new trial; and,
2. In overruling its motion in arrest of judgment.

We will first consider and decide the question presented by the second alleged error, namely, the sufficiency of the facts stated in the appellee's counter-claim to constitute a cause of action in his favor and against the appellant.

It is said that the "motion in arrest of judgment

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reaches any defect in the pleadings not cured by the verdict or the statute of amendments, or waived by failing to demur." *Adamson v. Rose*, 30 Ind. 380. *Waugh v. Waugh*, 47 Ind. 580, and *Gander v. The State, ex rel.*, 50 Ind. 539.

The defect in the pleading complained of must, therefore, be a substantial defect, affecting materially the merits of the cause, and neither cured by the verdict nor waived by the failure to demur; or it will not be reached by a motion in arrest of judgment. In the case at bar, the argument of the appellant's counsel, in discussing the alleged insufficiency of the counter-claim, is founded and proceeds altogether upon a misapprehension of the facts stated therein. Counsel says, "There is no allegation of the value of either machine," and after stating that the counter-claim counted upon a "breach of contract," he enquires, "What would be the measure of damages under such considerations?"

In his counter-claim, the appellee alleged in express terms, that his old machine was "of the value of fifty-five dollars," and that the new machine, which he received from the appellant, was "of no value whatever." Under these allegations, if sustained by the evidence, there certainly would be no difficulty in ascertaining the correct "measure of damages."

In our opinion, the court committed no error in overruling the appellant's motion in arrest of judgment.

The first alleged error calls in question the decision of the court in overruling the appellant's motion for a new trial. In this motion, there were assigned many causes for such new trial; but of these causes we will consider such only as the appellant's counsel has insisted upon, in his able and exhaustive brief of this case, as affording sufficient grounds for a new trial.

It is earnestly insisted that the court erred in giving the

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jury, of its own motion, instruction No. 1, which instruction reads as follows :

“1. In one paragraph of his answer, the defendant has pleaded, by way of counter-claim, that the note sued on in the second paragraph of the complaint was given in part payment for a sewing machine, etc.; that there was a contract made, at the time of the execution of the note, between the plaintiff and himself, in reference to said machine, as to the price and terms of his acceptance thereof. It is for you to say from the evidence, whether the defendant accepted the machine from plaintiff unconditionally, or subject to conditions. If you find from the evidence that defendant did not accept the machine, but only allowed it to be left with him for trial; that he made trial thereof, and found it not to be perfect, as stated; that he notified plaintiff of its imperfections; made demand on the plaintiff to repair it, or to furnish him one according to contract, as charged in his counter-claim; that they did not repair it, nor did they furnish him any other machine; that they failed to remove the machine, but left it in the defendant's possession; that defendant notified them to keep the terms of their contract, and refused to keep the machine because it was imperfect;—then you should find for the defendant as to the note sued on in the second paragraph of complaint; and if you further find that plaintiff obtained a good machine, as charged in the counter-claim, from defendant, in part payment of the machine now in question, then you should apply the value of this machine against the note in the first paragraph of complaint; and if there is a balance in favor of the defendant, you should find for him in that amount.”

The objection urged by the appellant's counsel to this instruction is, that it is “clearly a departure from the pleadings. No such case is made on paper, as that supposed. The case made is not that of a conditional sale. It

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was an absolute sale or barter. The property in each machine passed to the respective parties. The defendant was the unconditional owner of the machine he got by the trade; could have sold, encumbered, or otherwise disposed of it as he pleased. In like manner, the appellant was the absolute owner of the machine it got in the trade. By the terms of the trade, the title in no event was ever to revert to Reber." We are clearly of the opinion, that the position of the appellant's counsel, on this point, is well taken. The instruction of the court to the jury was foreign to, and outside of, the case made by the pleadings. The rule of law is well settled, that the instructions of the court to the jury trying the cause must be relevant to the issues in the case. *Wallace v. Morgan*, 23 Ind. 399; *Evans v. Gallantine*, 57 Ind. 367; and *Terry v. Shively*, 64 Ind. 106.

At the proper time, the appellant asked the court to give the jury trying the cause the following instruction:

"4th. The 3d [4th] paragraph of the answer is similar to the 2d [3d], except that it is pleaded as a counter-claim; no warranty is alleged, nor any fraud, but simply a failure on the part of the plaintiff to comply with a contract which he alleges to exist, whereby the machine traded for had become worthless, and the defendant seeks to recover, as damages, the price of the machine given in exchange, and to defeat the note given for the difference. The plaintiff [defendant] is only entitled to recover, on this paragraph, the actual damage sustained by the breach. If you find that he still retains the machine for which he traded, and that the same could have been repaired so as to work according to contract, then his measure of damages would be simply the cost of such repairs, which he would be entitled to have deducted from the note. If you find, however, that the plaintiff has never refused to repair the machine, on request, or that the defendant never requested the plaintiff to furnish him a new one, then your verdict should be for the plaintiff, on this paragraph."

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This instruction was refused by the court, upon the ground, as stated in the bill of exceptions, that it was "not the law." It seems to us, however, that the instruction contains a fair statement of the law applicable to the case made by the appellee's counter-claim and the issue joined thereon, and was pertinent to the appellant's evidence. Upon the appellant's contract, as stated in the counter-claim, and the alleged breach thereof, it is certain, we think, that this instruction contained the true rule of law for the measure of the appellee's damages. *Street v. Chapman*, 29 Ind. 142; *Booher v. Goldsborough*, 44 Ind. 490; and *Ferguson v. Hosier*, 58 Ind. 438.

In our opinion, the court erred in its refusal to give the jury this fourth instruction.

The appellant's counsel has also complained, in argument, of other rulings of the court alleged to be erroneous, and assigned as causes for a new trial; but, as these rulings may not occur on another trial, we do not deem it necessary for us now to consider or decide any question thereby presented.

For the reasons given, we think that the court erred in overruling the appellant's motion for a new trial.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the appellant's motion for a new trial, and for further proceedings in accordance with this opinion.

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EXECUTION.—*Sale of Lands on.*—*Inchoate Interest of Debtor's Wife, Prior to Act of March 11th, 1875.*—Prior to the taking effect of the act of March 11th, 1875, 1 R. S. 1876, p. 554, when the lands of a debtor were sold on

66	505
126	218
66	506
141	403
66	505
155	149

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an execution issued on a simple personal judgment, the purchaser, on receiving his deed from the sheriff, took the fee-simple title in the whole, subject only, so far as the wife of the debtor was concerned, to her inchoate interest in one-third thereof, which interest would become consummate in case she should survive her husband.

SAME.—Interest of Wife Under Act of 1875.—Partition.—By the act of 1875, the one-third in which the wife of the debtor has an inchoate interest can not be sold on an execution issued on a judgment rendered subsequent to the taking effect of that act; and, upon a sale of the other two-thirds on such execution and the vesting of the title thereof in the purchaser, her hitherto inchoate interest becomes consummate, and she is entitled to immediate possession thereof and to have the same set off to her by partition.

SAME.—Remedy.—Contracts Prior to that Act.—Such act affects only the remedy of the creditor, and that to a reasonable extent, and applies to judgments rendered on contracts made previous to, as well as to those made since, the taking effect of such statute.

SAME.—Constitutional Law.—Impairing Obligation of Contracts.—Such statute is not in conflict with the provisions of the State and Federal constitutions, prohibiting the enactment of any statute impairing the obligation of contracts.

BIDDLE, J., dissented and filed a dissenting opinion.

From the Bartholomew Circuit Court.

S. Stansifer, for appellant.

R. Hill, for appellee.

WORDEN, J.—Action to recover land. The following were the material facts in the cause:

In February, 1874, Alfred E. Taylor, who was and is the husband of the appellant, owned the land in dispute, which was worth less than twenty thousand dollars. At that date he, with others, executed a promissory note to the Howe Machine Company, for \$380.00. Afterward, in September, 1875, the payee of the note recovered a judgment thereon against the makers, in the Bartholomew Circuit Court. An execution was duly issued upon the judgment, by virtue of which the land in controversy was levied upon and sold by the sheriff, as the property of said Alfred E. Taylor, and the appellee, Stockwell, holds the sheriff's deed for the property, made in

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pursuance of the sale. The appellant claimed, under the act of March 11th, 1875, 1 R. S. 1876, p. 554, one-third of the land, and demanded that it be set off to her. The court below, however, decided against her, and she appeals to this court.

It will be sufficient, for the purpose of presenting the question involved, to set out the 1st and 2d sections of the act referred to. They are as follows :

"Sec. 1. *Be it enacted by the General Assembly of the State of Indiana,* That in all cases of judicial sales of real property, in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute and vest in the wife in the same manner and to the same extent as such inchoate interest of married woman now become absolute upon the death of the husband, whenever, by virtue of said sale, the legal title of the husband in and to such real property shall become absolute and vested in the purchaser thereof, his heirs or assigns, subject to the provisions of this act and not otherwise. That when such inchoate right shall become vested, under the provisions of this act, such wife shall have the right to the immediate possession thereof, and may have partition, upon agreement with the purchaser, his heirs or assigns, or upon demand, without the payment of rent, have the same set off to her.

"Sec. 2. The provisions of this act shall not apply to sales of real estate upon judgments rendered prior to the taking effect of this act, nor to any sale of real property of the value of twenty thousand dollars and over, nor to the sale of such real property of the aggregate value of twenty thousand dollars and over, except so much of such real property as shall not exceed in value the sum of twenty thousand dollars."

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It will be seen that the note upon which the judgment was rendered was executed before the taking effect of the statute, though the judgment was rendered afterward.

The statute, doubtless, in terms, applies to such case, and entitles the appellant to one-third of the land, and to immediate partition thereof, if it be valid as applied to judgments rendered upon contracts entered into by the husband before the taking effect thereof.

The appellee claims, and the court below decided, that the statute, as applied to sales on judgments rendered upon contracts with the husband, entered into before the taking effect of the act, is void, as being in conflict with the provisions in the Federal and State constitutions forbidding the passage of any law impairing the obligation of contracts. Const. U. S., Art. 1, sec. 24; Const. Ind., Bill of Rights, sec. 24.

The appellant contends, on the other hand, that the statute is constitutional and valid, as applied to such case.

We have been furnished with able and exhaustive briefs upon the point, by the counsel of the respective parties, which have greatly facilitated our labors in the examination of the question.

In order to a clear understanding of the question, it may be well to consider to what extent the creditor could have subjected the husband's land to the payment of the debt, by the law existing at the time the contract was executed. This will aid us to comprehend more clearly the extent and character of the change made by the act of 1875, and to determine the validity of the change as applied to contracts previously executed.

By the law as it stood at the date of the contract the creditor was entitled to have sold on execution the entire fee in the husband's land, for the payment of the debt. The purchaser, unless the land was redeemed as provided for, took the fee in the entire land, subject to the

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contingency that the wife should survive the husband; in which event he became divested of the title to one-third thereof, in favor of the surviving wife. In the event that the husband survived the wife, the purchaser retained the fee to the entire land; and in either event he held the entire land during the joint lives of the husband and wife.

By the act of 1875, the interest which the creditor could have sold on execution, and which the purchaser could acquire under the sale, was cut down to two-thirds of the land. The other third, to which the wife had only an inchoate right, during coverture, to become consummate only on the contingency that she should survive her husband, is given immediately to the wife. By the law of the date of the contract, the whole of the land could be sold, subject only to the wife's interest in one-third thereof, contingent upon her survivorship. By the law of 1875, only two-thirds of the land can be sold. In other words, the latter act exempts from sale on execution the third of the land to which the wife has an inchoate right during the marriage, to become consummate on the death of the husband leaving her surviving, and vests her immediately with the consummate right thereto, upon such sale of the other two-thirds.

It is sometimes difficult to determine satisfactorily, whether an enactment merely affects the remedy, without impairing the obligation of the contract; or whether, by affecting the remedy, it impairs that obligation.

The latest exposition of the subject, to which our attention has been called, is that contained in the case of *Edwards v. Kearzey*, 96 U. S. 595. In that case, a debt was contracted in North Carolina, at a time when only personal property to the value of fifty dollars, and real estate to the value of five hundred dollars, were exempt from execution. Afterward, by the constitution of that State of 1868, personal property to the amount

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of five hundred dollars, and a homestead not exceeding in value one thousand dollars, were exempted from execution. It was held that the increased exemption was invalid in respect to the prior contract, on the ground that it impaired the obligation thereof. The opinion of the court was pronounced by Mr. Justice SWAYNE, who, having considered the case at length, announced, as the conclusion of the court, the following proposition :

“ The remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the constitution, and is, therefore, void.”

It may be noted, that Mr. Justice HARLAN dissented, but the grounds of his dissent are not stated.

Mr. Justice CLIFFORD delivered the following opinion, which we regard as valuable, and which we can not condense without impairing its force. He said :

“ I concur in the judgment in this case, upon the ground that the State law, passed subsequent to the time when the debt in question was contracted, so changed the nature and extent of the remedy for enforcing the payment of the same as it existed at the time as materially to impair the rights and interests which the complaining party acquired by virtue of the contract merged in the judgment.

“ Where an appropriate remedy exists for the enforcement of the contract at the time it was made, the State Legislature can not deprive the party of such a remedy, nor can the Legislature append to the right such restrictions or conditions as to render its exercise ineffectual or unavailing. State Legislatures may change existing remedies, and substitute others in their place ; and, if the new remedy is not unreasonable, and will enable the party to enforce his rights without new and burdensome restrictions.

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the party is bound to pursue the new remedy, the rule being, that a State Legislature may regulate at pleasure the modes of proceeding in relation to past contracts as well as those made subsequent to the new regulation.

“Examples where the principle is universally accepted may be given to confirm the proposition. Statutes for the abolition of imprisonment for debt are of that character, and so are statutes requiring instruments to be recorded, and statutes of limitation.

“All admit that imprisonment for debt may be abolished in respect to past contracts as well as future; and it is equally well settled that the time within which a claim or entry shall be barred may be shortened, without just complaint from any quarter. Statutes of the kind have often been passed; and it has never been held that such an alteration in such a statute impaired the obligation of a prior contract, unless the period allowed in the new law was so short and unreasonable as to amount to a substantial denial of the remedy to enforce the right. *Angell Lim.* (6th ed.), sec. 22. *Jackson v. Lamphire*, 3 Pet. 280.

“Beyond all doubt, a State Legislature may regulate all such proceedings in its courts at pleasure, subject only to the condition that the new regulation shall not in any material respect impair the just rights of any party to a pre-existing contract. Authorities to that effect are numerous and decisive; and it is equally clear that a State Legislature may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or certain articles of universal necessity in household furniture, shall, like wearing-apparel, not be liable to attachment and execution for simple contract debts. Regulations of the description mentioned have always been considered in every civilized community as properly belonging to the remedy to be exercised or not by every sovereignty, according to its own views of policy and humanity.

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“Creditors as well as debtors know that the power to adopt such regulations resides in every State, to enable it to secure its citizens from unjust, merciless, and oppressive litigation, and protect those without other means in their pursuits of labor, which are necessary to the well-being and the very existence of every community.

“Examples of the kind were well known and universally approved both before and since the Constitution was adopted, and they are now to be found in the statutes of every State and Territory within the boundaries of the United States; and it would be monstrous to hold that every time some small addition was made to such exemptions that the statute making it impairs the obligation of every existing contract within the jurisdiction of the State passing the law.

“Mere remedy, it is agreed, may be altered, at the will of the State Legislature, if the alteration is not of a character to impair the obligation of the contract; and it is properly conceded that the alteration, though it be of the remedy, if it materially impairs the right of the party to enforce the contract, is equally within the constitutional inhibition. Difficulty would doubtless attend the effort to draw a line that would be applicable in all cases between legitimate alteration of the remedy, and provisions which, in the form of remedy, impair the right; nor is it necessary to make the attempt in this case, as the courts of all nations agree, and every civilized community will concede, that laws exempting necessary wearing-apparel, the implements of agriculture owned by the tiller of the soil, the tools of the mechanic, and certain articles or utensils of a household character, universally recognized as articles or utensils of necessity, are as much within the competency of a State Legislature as laws regulating the limitation of actions, or laws abolishing imprisonment for debt. *Bronson v. Kinzie*, 1 How. 311.

“Expressions are contained in the opinion of the court

which may be construed as forbidding all such 'humane legislation, and it is to exclude the conclusion that any such views have my concurrence that I have found it necessary to state the reasons which induced me to reverse the judgment of the State court."

Mr. Justice HUNT also delivered an opinion in the cause, in which he said :

"By the Constitution of North Carolina of 1868, the personal property of any resident of the State, to the value of \$500, is exempt from sale under execution ; also, a homestead, the dwelling and buildings thereon, not exceeding in value \$1000.

"The debts in question were incurred before the exemptions took effect. The court now holds that the exemptions are invalid. In this I concur, not for the reason that any and every exemption made after entering into a contract is invalid, but that the amount here exempted is so large, as seriously to impair the creditor's remedy for the collection of his debt.

"I think that the law was correctly announced by Mr. Chief Justice TANEY in *Bronson v. Kinzie*, 1 How. 311, when he said: A State 'may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of a mechanic, or articles of necessity in household furniture, shall, like wearing-apparel, be not liable to execution on judgments.'

"The principle was laid down with the like accuracy by Judge DENIO, in *Morse v. Gould*, 11 N. Y. 281, where he says: 'There is no universal principle of law that every part of the property of the debtor is liable to be seized for the payment of a judgment against him. * * * The question is, whether the law which prevailed when the contract was made has been so far changed that there does not remain a substantial and reasonable mode of enforcing it in the ordinary and regular course of justice. Taking

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the mass of contracts and the situation and circumstances of debtors as they are ordinarily found to exist, no one could probably say that exempting the team and household furniture of a householder to the amount of \$150 from levy or execution would directly affect the efficiency of remedies for the collection of debts. Mr. Justice WOODBURY lays down the same rule in *Planters' Bank v. Sharp et al.*, 6 How. 301.

"In my judgment, the exemption provided for by the North Carolina constitution is so large that, in regard to the mass of contracts and the situation and circumstances of debtors as they are ordinarily found to exist, it would seriously affect the efficiency of remedies for the collection of debts, and that it must, therefore, be held to be void."

It is thus seen that a State Legislature may exempt property from execution, such as implements of agriculture, tools of the mechanic, household furniture, etc., without impairing the obligation of contracts previously entered into, within the meaning of the constitution, or increase the amount of exemption after the making of a contract, without working such result.

This goes upon the principle that the Legislature may, in the pursuit of an enlightened public policy, and on principles of humanity, reserve to the debtor, as exempt from execution, the reasonable means of carrying on his business and occupation, and a reasonable amount of the necessities of life; and that this will not impair the obligation of previous contracts. The creditor knows, when he lends his credit, that the Legislature may make such reasonable exemptions.

Such exemptions are held not to materially impair the obligation of contracts. In the language of Mr. Justice SWAYNE, in the case above cited: "It is to be understood that the encroachment thus denounced must be material. If it be not material, it will be regarded as of no account."

The difficulty in such cases is to determine when the exemption is so great as to materially interfere with the remedy of the creditor, and when not.

In the North Carolina case, it was held that the exemption was so large as to thus interfere.

In the case of *Stephenson v. Osborne*, 41 Miss. 119, an act was passed exempting certain property from execution (the kind or value of which is not stated in the report of the case), and providing that, upon the death of the husband, it should descend to the widow. The law was held to be valid in respect to past contracts. The court said, among other things:

“Laws exempting certain descriptions of property from liability to be taken in execution for debt, are founded in a wise and beneficent public policy. The State has an interest that no portion of its citizens shall be reduced to a condition of destitution, so as to be prevented from prosecuting useful industrial employments, for which they are fitted; and that families shall not be deprived, by extravagance or misfortune, of the shelter and comforts necessary to health and activity.

“Nor is such legislation usually regarded, even when retrospective in its character, as obnoxious to constitutional objections. * * * * *

“The Legislature exercises this power according to its own views of humanity and sound policy. But it is not without its proper limit, and it may be abused. Every party is entitled to an adequate and available remedy for the enforcement of his contracts, and any legislation which impairs the value and benefit of the contract, though professing to act upon the remedy, would impair its obligation.

“It is not competent for the Legislature, under color of an exemption law, so to obstruct the remedy upon contracts as to render it nugatory or impracticable. An abuse

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of the legislative discretion in this respect, would demand the interposition of the court. We do not undertake to intimate what would amount to such abuse; such a question would be one of great delicacy and difficulty."

Afterward, in the case of *Lessley v. Phipps*, 49 Miss. 790, in the same State, where, at the time of the contract, land not exceeding one hundred and sixty acres, of a value not exceeding fifteen hundred dollars, was exempt from execution, and afterward the Legislature extended the exemption to two hundred and forty acres of land, regardless of its value, which might be worth ten thousand dollars or twenty thousand dollars, it was decided that the latter act was void as to the prior contract.

Having thus ascertained, as nearly as may be, the state of the law on the constitutional question, we proceed to apply it to the case before us.

Previous to the code of 1852, a widow was endowed of the lands of her deceased husband. By that code dower was abolished; and it was provided that one-third of the husband's lands, upon his decease, should descend to his widow, with a certain qualification as to amount, where there were creditors.

It was also provided, that upon the death of the husband, with the qualification above noticed, the surviving wife should be entitled to one-third of all the land of which the husband was seized in fee-simple, at any time during the marriage, in the conveyance of which she may not have joined in due form of law. See statute of descents, 1 R. S. 1876, p. 411, 413, secs. 16, 17, 27.

It may be observed that in *Noel v. Ewing*, 9 Ind. 37, these enactments were held valid as applied to a marriage existing at the time the statute took effect, so far as the husband and wife and the heirs and devisees of the husband were concerned. We are not aware that any question has ever been made in this court as to the validity of

the enactment giving the surviving wife one-third of the land, so far as existing creditors of the husband were concerned.

The wife then, as the law stood before the act of 1875, had an inchoate right to one-third of the land of which the husband was seized in fee-simple at any time during the marriage, and this right became consummate upon the death of the husband, unless she had, in the mean time, joined in the conveyance thereof in due form of law. This third, in connection with the other two-thirds, might have been sold on execution against the husband, subject to the contingency of the wife's survivorship. But, by the act of 1875, this third can not be sold at all in that manner; and, when the other two-thirds are thus sold, the hitherto inchoate right of the wife becomes at once consummate.

We are of opinion, in view of the principles and authorities hereinbefore noticed, that the Legislature did not transcend its authority in thus cutting off, to the limited extent mentioned in the statute as to the value of the property, the right to sell the third in which the wife had such inchoate interest. The act is not, in our opinion, open to the objection that it impairs the obligation of contracts.

The provision is but a reasonable one for the protection of the wife and family against absolute want and destitution; and the land thus saved may be as imperatively needed as the farming implements of the farmer, or the tools of the mechanic. The same public policy, and the same principles of humanity, that would protect the one would also protect the other from sale. Then the remedy of the creditor is not, in point of fact, materially impaired. Where lands are sold subject to the contingent interest of the wife, they seldom bring more than the value of the two-thirds, because this is all the purchaser is sure of getting. Before the purchaser receives his deed, which can not be

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within a year after the sale, the husband may die and the right of the wife become consummate.

The purchaser seldom enhances his bid in consequence of the chance of obtaining the title to the third in which the wife has an inchoate interest. Hence, the remedy of the creditor is not materially impaired by withholding that third from sale altogether.

And hence, also, much injustice is frequently done, where the purchaser bids what he safely may as the value of two-thirds, but eventually obtains title, by his purchase, to the whole, the wife not surviving.

It follows from what has been said, that the court below erred in holding that the statute was void as to judgments rendered upon prior contracts.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

Opinion filed at November Term, 1878.

Petition for a rehearing overruled at May Term, 1879.

DISSENTING OPINION.

BIDDLE, J.—My convictions compel me to dissent from the judgment of my brothers. I agree, however, that full comity and complete amity should exist between the legislative and judicial departments of government; but American courts possess the power—a power not conferred upon any other courts of the world—to declare legislation void whenever it violates the constitution, and, in such cases, it is their high duty to exercise the power; otherwise constitutions would be useless, indeed worse, for they would become mockery. A law that impairs a previous contract violates the constitution; but laws abolishing imprisonment for debt, exempting agricultural implements, mechanic's tools, artisans' instruments, the apparatus of science, the books of the professional man, or a

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limited amount of property necessary to sustain and protect a household, have been held valid, as against previous contracts. These laws do not practically impair a contract. They can not be applied unless the debtor is embarrassed, and then they do not take the property of the debtor from the creditor, but leave it with the debtor as a means of payment, and give him liberty that he may use the means. They at most but delay the creditor, and then only in cases when delay is inevitable from the inability of the debtor to pay. Such laws are supported by a strong principle of justice, a broad humanity and an enlightened policy. But the law under consideration takes the property of the debtor away from the creditor, after they had made their contract, and gives it to a third person forever, without any consideration or compensation. Such a law, in my humble opinion, has neither justice, humanity nor policy to support it. When applied to previous contracts, to my sight, it stands out a naked, inexcusable, indefensible wrong. Stay laws have universally been held unconstitutional as to previous contracts; yet these laws do not take away the property from the creditor, nor from the debtor, but simply delay payment of the debt, and then only upon the additional obligation of security to the creditor. How, then, can we hold this law to be constitutional, when it takes the property away from the creditor and the debtor alike? A valid contract, from which, after it has been made, the means of payment are taken away, is impaired; if the means are in part taken away, it is so far impaired; and a law which impairs a contract violates the constitution, and is void.

Nor can I perceive that the authorities cited by my brother WORDEN, in the opinion of the court, sustain its judgment. The latest, and one most relied upon, is *Edwards v. Kearzey*. In that case, the contract protected was not so palpably impaired as in the present case. There

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the property was merely exempted from execution, but still belonged to the debtor, and might at some future time be available, or aid by its use, in the payment of the debt; here the property is taken away from the creditor and debtor both forever, and never can be available, or in any manner aid, in the payment of the debt. Mr. Justice SWAYNE, in delivering the opinion of the court in that case, cites and quotes from many authorities, and expresses the opinion of the court, as follows :

“ The obligation of a contract includes every thing within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those ‘ imperfect obligations,’ as they are termed, which depend for their fulfilment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. ‘ Want of right and want of remedy are the same thing.’ * * *

“ It is also the settled doctrine of this court, that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge, and enforcement. * * *

“ “ One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation,—dispensing with any part of its force.’ * * *

“ These rules are axioms in the jurisprudence of this court. We think they rest upon a solid foundation. * *

“ We think the views we have expressed carry out the intent of contracts, and the intent of the Constitution.

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The obligation of the former is placed under the safeguard of the latter. No State can invade it; and Congress is incompetent to authorize such invasion. Its position is impregnable, and will be so while the organic law of the nation remains as it is. The trust touching the subject with which this court is charged is one of magnitude and delicacy. We must always be careful to see that there is neither nonfeasance nor misfeasance on our part.

“The importance of the point involved in this controversy induces us to restate succinctly the conclusions at which we have arrived, and which will be the ground of our judgment.

“The remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void.”

The Supreme Court of the United States is the ultimate authority in such questions as we are considering, and the case cited above, it seems to me, is in point, and fully sustains this dissenting opinion.

I think the court below was right, and that the judgment ought to be affirmed.

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MORTGAGE, FORECLOSURE OF.—Conveyance.—Breach of Warranty.—Gravel Road Tax.—Lien.—Pleading.—In a suit to foreclose a mortgage and for judgment upon a note secured thereby and given for part of the purchase-money of the real estate covered by said mortgage, a paragraph of answer by the defendant, setting up a breach of a covenant of warranty in the deed conveying such real estate to him, by reason of the alleged lien of a

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gravel road tax on the premises, and asking that the amount of such tax be deducted from the note, but not alleging that he had paid such tax or been in any way damaged, and not alleging facts showing such tax to be a valid and binding lien upon the property under the existing statutes upon the subject of such taxes, is insufficient.

SAME.—*Repealing Act of 1875.*—*Reviving Act of 1877.*—Where such conveyance was made after the enactment of 1875, repealing all gravel road laws, but the cause was tried after the enactment of 1877, reviving certain gravel road assessments, such an answer should aver facts showing that the assessment complained of comes within the latter statute.

SAME.—*Parol Agreement for Extension of Time of Payment.*—In such case, a second paragraph of answer setting up, in abatement of the action, a parol agreement, made after the execution of said note and mortgage, for an extension of the time of payment of the same, upon the promise of the defendant to pay such tax, but not showing that such tax was a valid lien upon the real estate, and not averring on the part of the defendant either performance of, or a willingness to perform, such parol agreement, is insufficient.

EVIDENCE.—Where the question as to whether or not a cellar is wet is in issue, the evidence of a witness who has never seen it, but who will testify, from the description of it given by other witnesses and from his knowledge of the condition of a cellar in a house at one time owned by him within a square of the cellar in question, that it can not be kept dry in wet weather, is not competent.

FRAUD.—*Failure to Complain.*—Where fraud is alleged as a defence to an action on a contract to pay money, the fact that the debtor never complained of the alleged fraud, in conversing with the creditor about the payment of the money, may be considered against the debtor.

From the Morgan Circuit Court.

W. S. Shirley, for appellants.

G. A. Adams, for appellee.

Howk, J.—This was a suit by the appellee, against the appellants, to foreclose a certain mortgage executed by the latter to the former, and to collect the debt secured thereby. The mortgage was dated on the 22d day of March, 1875, and by its terms the appellants mortgaged and warranted to the appellee the real estate in Morgan county, Indiana, described as lot number four, in block number three, in the town of Mooresville, to secure the payment of two notes, of the same date, each in the sum of five

hundred dollars, executed by the appellant Thomas R. Cook, and payable to the appellee. In his complaint the appellee alleged that the said notes were due and unpaid, and copies thereof and of the mortgage were filed with said complaint.

To this complaint, the appellants answered in three paragraphs, in substance as follows:

1. They admitted the execution of the notes and mortgage in suit, but they averred that the same were executed to secure the payment of the purchase-money for the real estate described in said mortgage, which was sold by the appellee to the appellant Thomas R. Cook; that the appellee conveyed said real estate by a deed, with full covenants of warranty, a copy of which deed was filed with and made part of said answer; that, when said deed was so executed by appellee, there was a lien on said real estate, to wit, a gravel road tax, which was duly and legally assessed against said lot and had been placed on the tax duplicate, in the hands of the treasurer of said county, in the sum of \$24.75, which the appellee refused to pay; and that the appellee was a non-resident of this State, and had no property in said county or State, subject to execution. Wherefore they asked that said tax be deducted from said notes or entered as a payment thereon.

2. They admitted the execution of said notes and mortgage, but they said that after the execution thereof, and before this suit was begun, they and the appellee made a new contract in relation thereto; that the consideration of said notes was a certain lot, situate in said county, which the appellee sold and by his deed, containing full covenants of warranty, conveyed to the appellants; that, at the time of said conveyance, there was a certain gravel road assessment, not due and unpaid, which constituted a lien upon said real estate; that in view of the appellee's liability and obligation to discharge said lien, when it should become due, the appellee agreed with the appel-

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lants, that they should assume to pay and discharge said lien and acquit the appellee of any liability to discharge the same; and that, in consideration of the said agreement of the appellants, the appellee agreed to extend the time of payment of said mortgage and notes for the period of two years from and after the 25th day of December, 1876. Wherefore they said that the time for payment of said notes was extended, and that none of the said notes were yet due, and they demanded judgment for costs.

3. They admitted the execution of the notes and mortgage in suit, but they said that the notes were given in part for the purchase-money of the lot described in the mortgage, which lot was sold and conveyed by the appellee to the appellant Thomas R. Cook; and, by way of counter-claim, the said Thomas R. Cook said that the real estate in said mortgage described consisted of a house and lot in the town of Mooresville, in said county; that, just before the execution of the notes and mortgage, the said Thomas R. Cook was examining dwelling-houses in said town, for the purpose of buying a house and lot for his family residence; that he desired a house with a good dry cellar, as conducive to health; that the appellee, as the owner of the house and lot described in said mortgage, to induce said Thomas R. Cook to purchase the same, falsely and fraudulently represented to said Thomas R. Cook and his co-appellant and wife, Mary Cook, that the same was a healthy location, and its cellar was dry at all seasons, and not affected by rain or dampness; that the appellants had no knowledge of the healthy condition of said property, as to locality, etc., and although said Thomas R. Cook examined the same and said cellar, yet it was impossible, from the season of the year and the condition of the house and cellar, for him or any one, with the exercise of reasonable prudence, care and diligence, to tell whether or not the house and location were healthy and the cellar was dry; that the said Thomas R. Cook relied upon the ap-

pellee's representations of the healthy location and condition of said house, and of the dryness of the cellar, and was induced thereby to purchase the property for his home and family residence; but the appellants averred that said lot was not a healthy location, and the said cellar was not a dry cellar, but in wet seasons and heavy rains the water accumulated and stood in said cellar and rendered the house damp and unhealthy; that the appellee well knew said fact, and had, prior to his sale of the property to said Thomas R. Cook, pumped said water out of said cellar, and had fraudulently concealed the same from the appellants, and they had no knowledge that the house was unhealthy, and that water accumulated and stood in said cellar, prior to the execution of said notes and mortgage and the purchase of said house and lot; that the appellants had been compelled to expend one hundred dollars in making a drain for said cellar; and that the house and lot were not worth as much by five hundred dollars, because of the unhealthy condition thereof, and because of the water accumulating and standing in said cellar. Wherefore the appellants said they had been damaged in the sum of six hundred dollars, and they asked that said damages might be recouped from the notes in suit, and for other proper relief.

To each of said paragraphs of answer the appellee demurred for the alleged insufficiency of the facts therein, which demurrers were sustained as to the first and second paragraphs, and to these rulings the appellants excepted. The demurrer to the third paragraph of answer was overruled by the court, and to this third paragraph the appellee replied by a general denial thereof.

The issues joined were tried by a jury, and a verdict was returned for the appellee, assessing his damages in the sum of one thousand dollars and fifty-two cents.

The appellants' motion for a new trial having been overruled, and their exception entered to this decision, judg-

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ment was rendered by the court on the verdict, and for the foreclosure of the mortgage in suit, and the sale of the mortgaged premises, etc.

The appellants have properly assigned, as errors, the following decisions of the court below :

1. In overruling their demurrer to appellee's complaint ;

2. In sustaining appellee's demurrers to the first and second paragraphs of their answer ; and,

3. In overruling their motion for a new trial.

1. In his brief of this cause in this court, the appellants' counsel admits the apparent sufficiency of appellee's complaint, and fails to point out any defect therein or objection thereto. The first alleged error is therefore waived.

2. The first paragraph of the appellants' answer was radically and fatally defective, on the appellee's demurrer thereto for the want of sufficient facts, from whatever stand-point it may be regarded. The paragraph sets up a gravel road tax of \$24.75, which, it was alleged, was a lien on the mortgaged premises, at the time the same were conveyed to the appellant Thomas R. Cook, by the appellee's warranty deed, and which the appellee had refused to pay ; and the appellants asked, that said tax might be deducted from the notes in suit, or entered as a payment thereon. They did not claim, in their answer, that they had paid this gravel road tax, or that they even intended to pay such tax, but they wanted credit for the amount thereof on their notes in suit. In argument, the appellants' counsel has frankly conceded, that "when the court below sustained the demurrer to this paragraph, * * * the act of the Legislature, making the gravel road tax a lien upon the land in question, had been repealed, and therefore it was no longer a lien upon the land." Acts 1875, Reg. Sess., p. 80. Counsel might have gone further and conceded, that at the date of the appellee's warranty deed

to the appellant Thomas R. Cook, to wit, on the 22d day of March, 1875, "the act of the Legislature, making the gravel road tax a lien upon the land in question, had been repealed, and therefore" the tax was *not* a lien upon the land, when the appellee, by his warranty deed, conveyed and warranted the title thereof to the appellant Thomas R. Cook. The repealing act referred to was approved on the 18th day of March, 1875; and, as it contained an emergency clause, it became a law in full force from and after its approval. As the gist of the first paragraph of the appellants' answer was the breach of the warranty in the appellee's deed, by reason of the alleged lien of the gravel road tax on the premises described in said deed, and as the law, making such tax a lien on said premises, had been absolutely and unconditionally repealed nine days before the execution of said deed by the appellee, it would seem to be a clear proposition, that the facts alleged in said paragraph did not show any breach of any of the covenants of warranty contained in said deed, and that, therefore, the appellee's demurrer to this paragraph of answer was correctly sustained.

It is suggested, however, by the appellants' counsel, that although the gravel road tax was not a lien upon the premises described in the appellee's deed to the appellant Thomas R. Cook, at the time the appellee's demurrer to the first paragraph of answer was sustained by the court, and although, for this reason, the decision of the court, on the demurrer, was probably correct at the time it was made, yet, as the Legislature, after such decision and before the final trial of this action, by an act approved March 2d, 1877, repealed the aforementioned repealing act of March 18th, 1875, and expressly revived the previous act, which made a gravel road tax a lien upon the lot or land against which it had been assessed, the decision of the court in sustaining the demurrer to the first paragraph of the answer, which was probably correct at the time it was

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made, was by said act of March 2d, 1877, rendered so erroneous that, by reason of this ruling, this court must reverse the judgment of the court below. The appellants' counsel is mistaken as to a matter of fact, when he claims that the act of March 2d, 1877, was in force at the time of the trial of this action; for the record shows that the verdict was returned, and judgment thereon was rendered by the court, on the 21st day of February, 1877. The act of March 2d, 1877, contained an emergency clause, and therefore it became a law from and after its passage. It follows clearly from what we have said, that neither at the time of the execution of the appellee's deed to the appellant Thomas R. Cook, nor at any time afterward and before the rendition of the judgment by the court below, in this cause, was there any law in force, in this State, which made the gravel road tax, mentioned in the first paragraph of the appellants' answer, a lien upon the real estate described in said deed. Therefore, it can not be said that the gravel road tax, or the appellee's refusal to pay such tax, constituted in any sense a breach of any kind of any of the covenants of warranty contained in appellee's deed; and therefore we think that the court committed no error in sustaining the demurrer to the first paragraph of the appellants' answer.

If, indeed, the act of March 2d, 1877, had been in full force at the time the first paragraph of the answer was filed, the paragraph would have been bad, on the demurrer thereto for the want of sufficient facts, because the paragraph did not contain such allegations of fact, as would show that the gravel road tax therein mentioned was "valid and binding," under the provisions of said act. From the language of said act, it will be readily seen that it did not render "valid and binding" *all* gravel road taxes which had been duly and legally assessed, under the provisions of the act of March 14th, 1869. In that event, to have made the first paragraph of the answer sufficient on this

point, and to have shown that the said gravel road tax was a valid lien on the real estate described in appellee's deed, it should have been alleged in said paragraph that the gravel road in question was, on the 2d day of March, 1877, owned and held by a majority of the original stockholders of the gravel road company, and that the directors of the company had, upon their faith in the assessments made, etc., incurred pecuniary liabilities by contract, etc., in the construction of the road, or of some part thereof, or of a toll-house, or other necessary appurtenances thereto. Acts 1877, Reg. Sess., p. 80, sec. 2. Under the provisions of the statute, these allegations would have been necessary for the purpose of showing that the gravel road tax mentioned in the first paragraph of the answer came within the purview of the act of March 2d, 1877, and was therefore so revived as to be "valid and binding."

On general principles, and independent of the provisions of the statute, the first paragraph of the answer was also bad, on the demurrer thereto for the want of sufficient facts, because it was not alleged in said paragraph that the appellants, or either of them, had been endamaged in any manner, or to any extent, by reason of the alleged lien of the alleged gravel road tax, or that they, or either of them, had been subjected to any expense, or put to any inconvenience, on account of the alleged breach of any of the covenants of warranty contained in appellee's deed. *Estep v. Estep*, 23 Ind. 114; *Mahoney v. Robbins*, 49 Ind. 146; *Gillfillan v. Snow*, 51 Ind. 805.

From what we have said, it seems clear to us, that the facts alleged in the second paragraph of the answer were not sufficient to constitute any defence to the appellee's action. This paragraph counted upon an alleged parol agreement for the extension of the time of payment of the notes in suit, made and entered into after the execution of the notes and mortgage. On the face of the para-

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graph, it appeared that the alleged agreement was a *nudum pactum*, on the part of the appellee, the supposed consideration therefor, as stated in the answer, having no existence whatever, either in law or in fact. Besides, this paragraph was clearly insufficient for the reason that the appellants did not allege therein performance of, or even a willingness to perform, their part of the agreement, that they had acquitted, or were even ready and willing to acquit, the appellee of any liability to pay the said gravel road tax and discharge the alleged lien thereof. The demurrer to the second paragraph of answer was, we think, correctly sustained.

3. Under the alleged error of the court, in overruling the motion for a new trial, we will consider and decide such questions only as the appellants' counsel has directed our attention to and discussed, in his brief of this cause. It is earnestly insisted by counsel, that the court erred in the exclusion of certain evidence, offered on the trial by the appellants. It appears from a bill of exceptions, properly in the record, that the appellants offered to prove on the trial by one Sylvester H. Dakin, a competent witness in their behalf, the following facts: "That he once owned property, within a square of the house and lot in question; that the water rose in the cellar; that he tried to cement the sides and bottom so as to keep the water out, and tried every way to keep the water out, but the force of the water would finally break the cement and more enter the cellar, and what he did fully convinced him that the water could not be prevented from coming into the cellar; and he had not been in the cellar in question nor seen it, but from the description given by the witnesses of the cellar in question he would say that the cellar could not be fixed so as to keep the water from rising in the cellar, during rainy and wet weather." To this evidence the appellee's objections were sustained by the court, and to this ruling the appellants excepted.

Ex Parte Trippe

There was no error, as it seems to us, in the exclusion of this evidence. The witness had not been in the cellar in controversy, had never seen it, and had no personal knowledge of or concerning it. The fact that he had at some uncertain time, in the near or remote past, owned property "within a square" of the appellants' house and lot, and that there had been a wet cellar in the property once owned by him, would not, we think, render what "he would say" competent evidence on the questions at issue in this case.

The appellants' counsel has also complained of the third instruction to the jury, given by the court at the appellee's request, as erroneous. This instruction reads as follows:

"If you find from the evidence, that defendant has, since June, 1875, and since he alleges that said water first rose in his cellar, had conversations with plaintiff or his agent about the payment of the balance of the purchase-money, and that, in said conversation, he said nothing about plaintiff's having falsely represented said property at the time he purchased the same, then you can consider that fact in weighing the testimony of defendant in this case, as to whether or not said representations were made."

We fail to see any error in this instruction. The only objection suggested by the appellants' counsel to this instruction is, that it is too imperative in its terms; but it does not seem so to us.

In our opinion, the court did not err in overruling the motion for a new trial.

The judgment is affirmed, at the appellants' costs.

EX PARTE TRIPPE.

ATTORNEY.—*Disbarment of.*—*Proceeding must Comply with Statute.*—*Appeal.*—*Assignment of Error.*—*Practice.*—A proceeding to disbar an attorney must conform to the requirements of section 780 of the code, 2 R. S.

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1876, p. 308. A summary order, made by the court upon its own motion, against a person, impliedly recognizing him as an attorney, prohibiting and debarring him from practising as an attorney at the bar of such court, without any compliance with said section 780, is void, and an appeal will lie therefrom, and objection to such proceeding can be properly taken by assigning error upon the transcript of it, in the Supreme Court.

SAME.—*Presumption that Practising Attorney has been Licensed.*—Where a person has been in fact practising as an attorney, he will be presumed, the contrary not appearing, to have been licensed to practise.

From the LaPorte Circuit Court.

S. L. Trippe, for appellant.

J. Bradley, for appellee.

PERKINS, J.—Article 45 of the code, 2 R. S. 1876, p. 302, contains the law of this State touching the duties of attorneys at law, their powers, liabilities, mode of their suspension from practice, etc. Section 771 of said article prescribes the duties of an attorney, thus:

“*First.* To support the constitution and laws of the United States and of this State.

“*Second.* To maintain the respect that is due to the courts of justice and judicial officers.

“*Third.* To counsel or maintain such actions, proceedings or defences, only, as appear to him legal and just; but this section shall not be construed to prevent the defence of a person charged with a crime, in any case.

“*Fourth.* To employ, for the purpose of maintaining the causes confided to him, such means, only, as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law.

“*Fifth.* To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his clients.

“*Sixth.* To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged.

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“*Seventh.* Not to encourage the commencement or the continuance of an action or proceeding from any motive of passion or interest.

“*Eighth.* Never to reject, from any consideration personal to himself, the cause of the defenceless or oppressed.”

Sections 777, 778 and 779 of the code, forming a part of said article, enumerate the causes for which an attorney may be disbarred or suspended from practice, one of which is “a wilful violation of any of the duties of an attorney, as hereinbefore prescribed.”

Sections 780 and 781 regulate the proceedings for the removal or suspension of an attorney. Section 780 enacts that :

“The proceedings to remove or suspend an attorney may be commenced by the direction of the court, or on motion of an individual. In the former case, the court must direct some attorney to draw up and prosecute the accusation ; in the latter case it may be drawn up by any person, and sworn to by the person making it. Such accusation may be filed in any court in which the attorney practises, and after five days’ notice of the filing, the attorney shall be bound to appear and plead to the same, or suffer judgment by default. If he appear, pleadings may be filed and trial had as in other cases.”

Section 781 relates to appeals, etc., in such cases. See *Ex Parte Walls*, 45 Ind. 461.

There are other provisions authorizing courts to punish contempts,—proceedings different from those of debarring from practice. 2 R. S. 1876, pp. 2 and 8, and notes ; *Whittem v. The State*, 36 Ind. 196.

In the case at bar, the following is the record of the entire proceeding in the removal of Mr. Trippe. No accusation was filed, and of course no notice of such filing was given. The court proceeded summarily, upon its own motion, and made the following order :

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"It is hereby ordered by the court, that S. L. Trippe be, and he is hereby, prohibited and debarred from practising as an attorney at the bar of this court; and the clerk of this court is hereby ordered to refuse to issue process on complaints or other papers filed by, and upon which the name of the said Trippe appears as attorney; and to disregard all orders and *præcipes* emanating from him; and to refuse to file any papers offered to be filed by him in the office of the clerk of this court, as an attorney; the said Trippe being debarred not to be a member of the bar of this court, and is hereby prohibited from practising therein; and that said Trippe be not allowed to take from the files in the office of the clerk of this court any books or papers belonging to said office."

The clerk of said court duly certifies under the seal of said court, "that the above and foregoing is a full, true and complete copy of all the orders, papers, judgment and proceedings of said court in the said matter of S. L. Trippe, *ex parte*, as the same appears of record in my office." In witness, etc., at LaPorte, on this 20th day of May, A. D. 1879.

Signed, "Charles Spratt, Clerk LaPorte Circuit Court, by M. D. Farrand, deputy."

The transcript of the record was filed in this court on the 21st of May, 1879, and the following assignment of errors made thereon under the title of the cause.

"Sylvanus L. Trippe, the appellant, says that there is manifest error in the judgment and proceedings in this case, in this, to wit:

"1. That the court erred in making the order without notice to the appellant;

"2. That the court erred in making such order and judgment, without any complaint or charge having been filed against said appellant;

"3. That the court erred in rendering a judgment sus-

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pending appellant from practice in a court of record, without first granting him a trial as provided for by law;

" 4. That the court erred in making an *ex parte* order, without showing affirmatively some cause for such order;

" 5. That the court had no jurisdiction of the appellant, and had no power to enter such order and judgment. For which errors the appellant prays that said judgment and order may be in all things reversed and set aside.

" SYLVANUS L. TRIPPE, Appellant."

A supersedeas was granted, and issued in the cause.

This was a proceeding disbaring an attorney, simply, and should have conformed to the requirements of the statute above quoted. *Ex Parte Smith*, 28 Ind. 47, is in point.

At common law, an attorney was an officer of the court, and the court possessed inherent power to strike his name from the roll of attorneys. *Weeks Attorneys*, p. 140.

The proceeding had in this case was erroneous, and so appears upon its face. Objections to it could be properly taken, by assigning error upon the transcript of it in this court; especially, as the said order prohibited the clerk below from filing any paper offered for filing by said Trippe.

The judgment is reversed, and set aside for naught; all which is ordered to be certified, etc.

The foregoing decision was rendered on the 31st of May last. A petition for a rehearing was granted. The case was re-submitted to the court on the 17th of July last, on a motion to dismiss, on the part of the circuit court. The motion was made upon the theory that it did not appear that Trippe was an attorney, admitted as such; but that the court, suspecting him of an intention to try to practise as such, without being admitted so to do, made the order, as a precautionary measure, stating, however, no ground of suspicion; that, hence, Trippe was not in-

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jured, and no case existed for an appeal. But we think the order was clearly made against Trippe as a practising attorney of the court, and impliedly admits that he was such. The order states that he is debarred from practising as an attorney at the bar of that court; and that the clerk of the court is ordered to refuse to issue process on complaints filed by him, and on which his name appears, and to refuse to file any further papers offered by him for filing in the future, admitting by implication that he had been filing them in the past, and that he be not allowed to take from the clerk's office books and papers, etc., the said Trippe being declared not to be any longer a member of the bar of this court. Such we understand to be the purport of the order. Was there any need of such an order as this upon the clerk, if Trippe had not before been in the habit of filing papers, and having process issued upon them, as an attorney, and taking books and papers from the office, like other attorneys? The matter is too plain to require argument. But, if it is not, equivocal *ex parte* proceedings are not to be favored in such cases. Further, if he had been, in fact, practising, he will be presumed, the contrary not appearing, to have been licensed to do so. The order, then, having been issued against Trippe as an attorney of the court, was void. The appeal must be sustained, and the cause again decided on its merits.

We reaffirm the former decision in the cause, reversing the judgment below.

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CHATTEL MORTGAGE.—*Record of, Admissible in Evidence without Proof as to Original.*—*Promissory Note.*—*Replevin.*—In a suit to recover the possession of a mortgaged chattel, and damages for its detention, the record of

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the chattel mortgage to the plaintiff, and of a promissory note set out in such mortgage and record, is, under section 283 of the practice act, 2 R. S. 1876, p. 150, admissible in evidence without proof of the execution, and without accounting for the absence, of the original of either the mortgage or the note.

SAME.—Foundation of Action.—Pleading.—Copy.—In such case, neither the mortgage nor the note is the foundation of the plaintiff's action, and it is not necessary that either should be filed with or made part of the complaint.

SAME.—Description of Property Intended to be Mortgaged.—Parol Evidence.—In a chattel mortgage, the property should be described with reasonable particularity; but in this State parol evidence is admissible to identify the property; and where the chattel is described as a "dark bay mare," the mortgage is not void for uncertainty in the description.

EVIDENCE, HOW INTRODUCED.—Error in Admission of, when Cured.—Discretion of Court.—Practice.—A party may introduce his evidence in the order he prefers, subject only to the discretion of the court trying the cause; and where evidence has been admitted, which, standing by itself, is erroneous, the error may be cured by the subsequent admission of evidence supplying the defect, and is not then available on appeal.

From the Wayne Circuit Court.

S. A. Forkner, for appellants.

T. J. Study and *M. Wilson*, for appellee.

Howk, J.—This was a suit by the appellee, against the appellants, for the recovery of the possession of "a certain dark bay mare," and of "damages for her detention."

In his complaint, the appellee alleged, in substance, that he was the owner, and entitled to the possession, of a certain dark bay mare, of the value of one hundred dollars; that the appellants had possession of said mare unlawfully and without right; and that the appellants unlawfully and without right detained said mare from the appellee, at Wayne county, Indiana. Wherefore, etc.

To this complaint the appellants demurred, for each and all of the statutory causes of demurrer, assigning several grounds of objection to the complaint. The demurrer was overruled by the court, and to this ruling the appellants

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excepted. They then answered by a general denial of the complaint.

The cause was tried by the court, and a finding was made for the appellee, that he was the owner of the dark bay mare described in his complaint, and entitled to the possession thereof, and that the mare was of the value of fifty dollars; and the court rendered judgment accordingly.

The appellants' motion for a new trial was overruled by the court, and to this decision they excepted, and filed their bill of exceptions.

The appellants have here assigned, as errors, the following decisions of the court below :

1. In overruling their demurrer to appellee's complaint; and,
2. In overruling their motion for a new trial.

In his brief of this cause in this court, the appellants' counsel has failed to point out any objection, and we can see none, to the sufficiency of the appellee's complaint. The first alleged error must therefore be regarded as impliedly waived.

In their motion for a new trial, the appellants assigned the following causes therefor:

1. The finding of the court was not sustained by sufficient evidence;
2. The finding of the court was contrary to law;
3. The court erred in admitting in evidence, over the appellants' objections, the record of a chattel mortgage from one Daniel Williams to the appellee, from a mortgage record of the office of the recorder of Wayne county, for the reason that the execution of the original mortgage had not been proved before the record thereof was so admitted in evidence, nor was said mortgage, or a copy thereof, made a part of, or referred to in, the pleadings in this cause;

4. The court erred in admitting in evidence, over the appellants' objections, the copy of the note set out in said mortgage, for the reason that the execution of said note was not proved before such copy was introduced or read in evidence, and neither the note nor a copy thereof had been made a part of, or referred to in, any of the pleadings, in this case;

5. The damages were excessive.

It is claimed by the appellants' counsel, in argument, that the following questions are presented for decision, by the record of this cause and the alleged error of the court in overruling the appellants' motion for a new trial:

1. Did the court err in admitting in evidence, over the appellants' objection, the record of the chattel mortgage and the copy of the note set out in, and secured by, said mortgage, when neither the mortgage and note, nor copies thereof, had been filed with, or made part of, any pleading in the case, without first proving the execution of such mortgage and note?

2. In a chattel mortgage, wherein the chattel is described as a "dark bay mare," is the description sufficient notice to an innocent purchaser, who buys a "dark brown mare," when the possession of the chattel is retained by the mortgagor, by the terms of the mortgage, until the note secured thereby becomes due?

3. Is a chattel mortgage, wherein the chattel mortgaged is described as a "dark bay mare," void for uncertainty in the description of the property intended to be mortgaged?

We will consider and decide these several questions, in the same order in which the appellants' counsel has presented them in his elaborate and well considered brief of this cause.

1. In section 10 of "An act for the prevention of frauds and perjuries," etc., approved June 9th, 1852, it was pro-

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vided, *inter alia*, that a chattel mortgage should "be acknowledged, as provided in case of deeds of conveyance, and recorded in the recorder's office of the county where the mortgagor resides within ten days after the execution thereof." 1 R. S. 1876, p. 505.

The chattel mortgage from Daniel Williams to the appellee appeared to have been recorded under and pursuant to, and in strict conformity with, the requirements of this section 10 of the statute for the prevention of frauds and perjuries. The mortgage appeared to have been acknowledged by the mortgagor, Daniel Williams, "as provided in case of deeds of conveyance" and the certificate of such acknowledgment appeared to have been recorded with the mortgage. Under section 283 of the practice act, it can not be doubted, we think, that a certified copy of the record of the mortgage would have been "admitted as legal evidence," in any court in this State, without accounting for the absence of the original mortgage; and it would be strange, indeed, if the record of the mortgage was not admissible in evidence, when the statute, in express terms, makes a copy of such record admissible as "legal evidence." 2 R. S. 1876, p. 150; *Winship v. Clendenning*, 24 Ind. 439; *Bowers v. Van Winkle*, 41 Ind. 432; *Patterson v. Dallas*, 46 Ind. 48; and *Miller v. The State, ex rel.*, 61 Ind. 503.

In the case last cited, it was expressly decided, that where the statute made a copy of a record "legal evidence," the record itself must also, of necessity, be regarded and received as "legal evidence."

In the case at bar, we are clearly of opinion, that the record of the chattel mortgage to the appellee, and of the note set out in and constituting a material part of such mortgage and record, was properly admitted in evidence, without proof of the execution, and without accounting for the absence of the original of either the mortgage or

the note. Neither the mortgage nor the note was, in any proper sense, the foundation of the appellee's action; and, therefore, it was not necessary, under the requirements of the practice act, that either the mortgage or the note, or a copy of either or both of them, should be filed with, or made part of, the appellee's complaint. 2 R. S. 1876, p. 73, sec. 78; *Winship v. Clendenning*, *supra*.

After the record of the mortgage and of the copy of the note set out in said mortgage had been given in evidence by the appellee, the execution of both mortgage and note by Daniel Williams was proved without objection on the part of the appellants, and the non-production of the original mortgage and note on the trial was properly accounted for, by parol evidence. As a party may introduce his evidence in the order he prefers, subject only to the discretion of the court trying the cause, it would seem that the decision of the court in this case, in the admission in evidence of the record of the mortgage and of the copy of the note set out therein, would not have been an available error, upon the entire record, for the reversal of the judgment, even if such record had not been "legal evidence," without proof of the execution of the mortgage and note and without evidence accounting for the absence of the original instruments. (*Goings v. Chapman*, 18 Ind. 194; *Ginn v. Collins*, 43 Ind. 271; and *Heilman v. Shanklin*, 60 Ind. 424.

The court did not err, in our opinion, in admitting in evidence, over the appellants' objections, the record of the mortgage and of the copy of the note constituting an essential part of such mortgage.

2. Under the law of this State, the owner of personal property may mortgage the same, and the statute requires that such a mortgage shall be acknowledged by the mortgagor and recorded in the recorder's office of the county in which he resides, within ten days after the execution

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thereof. Such a record of the mortgage is notice to all persons of the existence of the mortgage and of the contents of such record. *Gilchrist v. Gough*, 63 Ind. 576.

In such a mortgage, the property mortgaged ought to be described with reasonable accuracy, certainty and particularity; so that the property intended to be mortgaged may be readily ascertained and identified. Indeed, the main object of the description is the identification of the property. In a mortgage on personal property, the description given in the mortgage is not, however, the only means of identifying the particular property intended to be mortgaged; for, where the description is doubtful or uncertain, the mortgaged property may be identified beyond all doubt, by the ownership and the possession thereof by the mortgagor. It must be regarded as settled law, in this State, that parol evidence is admissible to identify the particular property in a chattel mortgage. *Duke v. Strickland*, 43 Ind. 494; *Ebberle v. Mayer*, 51 Ind. 235.

In the case at bar there is no room for doubt, on the evidence, as to the identity of the mare mortgaged to the appellee, with the mare in the possession of the appellants, and in controversy in this action. The question in dispute was as to the color of the mare,—whether she was a “dark bay mare,” or a “dark brown mare.” This question was determined by the court in favor of the appellee, and we can not disturb the finding on the evidence.

3. The third question propounded by the appellants’ counsel, it is very clear, must be answered in the negative. A chattel mortgage, wherein the mortgaged chattel is described as a “dark bay mare,” is not void for uncertainty in the description of the chattel. This must be so, when the law is settled, as we have seen, that parol evidence is admissible to identify the mortgaged chattel.

No error was committed by the court, we think, in overruling the appellants’ motion for a new trial.

The judgment is affirmed, at the appellants’ costs.

Guthrie *et al.* v. Buckeye Cannel Coal Company.

GUTHRIE ET AL. v. BUCKEYE CANNEL COAL COMPANY.

DEPOSITIONS.—*Sufficiency of Officer's Certificate to.*—The certificate annexed to depositions was substantially as follows: "I," etc., "a notary public in and for," etc., "duly commissioned," etc., "do hereby certify that the above named," etc., "were by me first duly sworn," etc., "to testify the truth," etc., "relating to said cause; that said depositions were reduced to writing by me; that the said," etc., "adverse party herein, did not attend by attorney or in person, and said depositions were taken at the law-office of," etc., "in," etc., "on," etc., "between the hours of," etc. "In testimony," etc.

Held, that this certificate fills the requirements of the statute.

From the Montgomery Circuit Court.

S. C. Willson and *L. B. Willson*, for appellants.

E. C. Snyder, for appellee.

PERKINS, J.—The appellee sued the appellants upon an account, and recovered judgment.

The assignment of errors on appeal to this court is as follows:

1. The court erred in overruling appellants' motion to suppress certain depositions;
2. In overruling the motion for a new trial.

The evidence is not in the record.

Counsel for appellants in their brief say:

"The question, then, to be determined by the Supreme Court is: Did the circuit court err in overruling the motion to suppress the depositions? The motion was made on account of a defect in the certificate of the officer before whom they were taken, in this, that it is not shown in the caption, certificate or body of said deposition, that the several witnesses ever signed said depositions respectively, or that said depositions were, severally, carefully read over to or by said several witnesses in compliance with the statute."

The statute on the subject of taking and certifying depositions in this State is as follows, 2 R. S. 1876, p. 141:

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"SEC. 255. The deponent shall be first sworn by the officer to testify to the truth, the whole truth, and nothing but the truth, relating to the cause or matter for which the deposition is to be taken; and he shall then be examined by the party producing him, and then by the adverse party, and by the officer or parties afterwards, if they see cause.

"SEC. 256. The deposition shall be written down by the officer, or by the deponent, or by some disinterested person, in the presence, and under the direction of the officer, and after the same has been carefully read to or by the deponent, it shall be subscribed by him.

"SEC. 257. The officer shall annex a certificate to the deposition, stating the following facts:

"*First.* That the deponent was sworn according to law;

"*Second.* By whom the deposition was written; and if written by the deponent, or some disinterested person, that it was written in the presence, and under the direction of the officer;

"*Third.* Whether or not the adverse party attended;

"*Fourth.* The time and place of taking the deposition, and the hours between which the same was taken; and the officer shall sign and attest the certificate, and seal the same, if he have a seal of office.

"SEC. 258. The officer taking the deposition shall seal up the same in a sufficient paper envelope, and direct the same to the clerk of the court in which the action is pending, indorsing on the envelope the names of the parties and of the witnesses whose depositions are enclosed."

The names of the deponents in this case appear to be signed to the depositions.

The certificate in this case follows, omitting the name of the State and county:

"I, Arnold J. Padgett, a notary public in and for the county and State above named, duly commissioned and

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qualified, do hereby certify that the above named John B. Slater" (and the other deponents), "were by me first duly sworn according to law to testify the truth, the whole truth, and nothing but the truth, relating to said cause; that said depositions were reduced to writing by me; that the said Fountain B. Guthrie and Silas Guthrie, adverse party herein, did not attend by attorney or in person, and said depositions were taken at the law-office of William Armstrong, attorney at law, in the city of Washington, in the county of Daviess and State of Indiana, on the 24th, 25th, 27th, 28th, 29th, 30th and 31st days of August, 1877, and the 1st day of September, 1877, between the hours of 8 o'clock A. M. and 6 o'clock P. M. of said days.

"In testimony," etc., the proper conclusion following.

This certificate fills the requirements of the statute.

In *Ramsey v. Flannagan*, 33 Ind. 306, where objection was made to the certificate to depositions as not being full enough, it was said:

"As the certificate fulfilled the exact requirement of the statute, the court properly overruled the motion for this cause." See *Prather v. Pritchard*, 26 Ind. 65.

The judgment is affirmed, with costs.

THE ARMSTRONG FURNITURE CO. v. KOSURE ET AL.

MISTAKE.—Fraud.—Weight of Evidence.—Supreme Court.—Where A. sells and delivers lumber to B., at a certain price per thousand feet, and the latter, upon measurement, deducts a part for splits, knots and defects, and A., not knowing of such deduction, accepts the note of B. for the amount of the lumber according to the measurement of the latter, which note is afterward paid, a suit may subsequently be brought upon the account, for the balance so deducted, and evidence may be introduced to correct the mistake made by B. in the measurement; and when this evidence has been passed upon by the court and jury below, the Supreme Court will not disturb the verdict and judgment upon the mere weight of such evidence.

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From the Vanderburgh Circuit Court.

J. E. Williamson and *W. M. Blakey*, for appellant.

R. V. Hodson, *C. Denby* and *D. B. Kumler*, for appellees.

BIDDLE, J.—This was an action brought by appellees, against the appellant, before a justice of the peace, on the following account:

“EVANSVILLE, IND., July 10th, 1876.

“THE ARMSTRONG FURNITURE Co.,

Bought of KOSURE & BOURLAND:

17,000 feet of Walnut lumber, @ \$30—\$510.00

2,800 “ “ “ “ “ — 84.00

350 “ “ “ “ “ — 10.50

—————
\$604.50.

“Settled by Note,..... 434.61.

—————
“Balance, ...\$169.89.”

Before the justice the appellant had judgment in its favor. The appellees appealed to the circuit court, wherein, upon a trial by jury, they recovered judgment for the balance due them, as stated in the account. The appellant reserved a number of questions in the record, but in its brief in this court presents but one, namely: Is the evidence sufficient to sustain the verdict?

The evidence tends to prove that the appellees sold and delivered to the appellant 20,150 feet of walnut timber, as stated in the cause of action. It tends to prove that the appellant, upon measurement, made the amount only 14,487 feet, and informed the appellees accordingly; and tends to prove that the appellees accepted that measurement, and received the note of the appellant for the amount, which was afterwards paid. The evidence also tends to prove that, in the measurement of the lumber, the appellant deducted nearly one-third for splits, knots, and defects. It also tends to prove that the appellees did not know, at the time they accepted the note of the appellant for the

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balance of the account, that any such deduction had been made in the measurement. This evidence, applied to the cause of action, shows the controversy to be between the two measurements; the appellees claiming the amount to be 20,150 feet, and the appellant claiming it to be only 14,487 feet. The price is not in dispute; it was to be thirty dollars per thousand feet.

The appellant claims that after the appellees had accepted the measurement of the lumber made by appellant, and received its note for the amount, which was afterwards paid, they could not impeach the settlement except for fraud or mistake, and that there is no evidence tending to show either fraud or mistake.

Admitting that there is no evidence in the record tending to prove any fraud on the part of the appellant, yet there certainly is evidence tending to prove that there was a mistake made by the appellant in measuring the lumber, by which the whole amount was not accounted for to the appellees. Such an error could be corrected by the evidence. It may be noticed, too, that if no deduction had been made from the appellant's measurement, it would have agreed substantially with the claim of the appellees. Now, all of this was submitted to the jury; they found in favor of the appellees; the circuit court held the verdict to be right; it is impossible for us to see, by the record, wherein it is wrong.

The judgment is affirmed, at the costs of the appellant.

HINDS v. OVERACKER.

MASTER AND SERVANT.—*Action by Servant against Co-Servant.—Negligence.*—A servant is liable to a co-servant in damages, for a physical injury

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resulting to the latter by means of the negligence of the former, in the performance of labor for a common master.

INSTRUCTION.—*Harmless Refusal.*—Where an instruction given embraces the substance of one refused, the refusal is harmless.

From the LaPorte Circuit Court.

A. Anderson, W. G. George, — Pfleger, W. H. Calkins, and D. J. Wile, for appellant.

L. A. Cole and L. Hubbard, for appellee.

PERKINS, J.—The appellee sued the appellant, to recover compensation in damages for an injury he sustained through the alleged negligence of the latter.

Judgment below for the appellee for one thousand dollars.

This case originated in the disaster described in *Hinds v. Harbou*, 58 Ind. 121.

The appellee was an *employe* in the building mentioned in said description, and was injured by its fall.

It was contended in this, as it was in that, case, that an action would not lie by one servant against a co-servant in the same undertaking; but it was decided in that case that such an action would lie, in a proper case.

The refusal of an instruction is complained of. The instruction had been substantially given in the general instructions of the court.

But one other point is made by appellant, that is, that the verdict was not supported by the evidence. There was evidence from which the jury might have found the liability of the appellant.

The judgment is affirmed, with costs, as of the date of the submission of the cause.

KRAMER ET AL. v. WARTH.

SUPREME COURT.—*Appeal for Delay.—Damages.—Brief.*—A failure by the appellant, on appeal from a judgment against him for the pay-

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ment of money, to present any argument in his brief in support of any of the errors assigned by him, justifies the affirmance of the judgment, with damages added.

From the Boone Circuit Court.

P. H. Dutch, for appellants.

J. C. Farber, for appellee.

NIBLACK, J.—This was an action by Mary Warth, against Baltzer Kramer, Ira N. Holmes, Jeffrey Horner, Lucien Rous and Isaac Gerhart, upon a promissory note.

The defendants moved to have additional party defendants made to the action, but their motion was overruled.

Issue being joined, the cause was tried by the court. The court found that there was due to the plaintiff the sum of eleven hundred and seventeen dollars and twenty-nine cents, and, after overruling a motion for a new trial, rendered judgment against the defendants for that sum.

The defendants have appealed, and assigned for error here the overruling of their motion to have new parties made to the action, and the refusal of the court to grant them a new trial.

In their brief, the appellants have not presented any thing in support of the errors they have assigned, nor have they urged any thing which can be denominated an argument, to sustain their appeal.

Under such circumstances, the judgment will have to be affirmed, and we think damages ought to be assessed against the appellants, on account of the apparent unnecessary delay which has resulted from this appeal.

The judgment is affirmed, with costs and five per cent. damages.

THE MARION AND MONROE GRAVEL ROAD COMPANY v. KESSINGER ET AL.

PROMISSORY NOTE.—*Endorsement, Meaning Of.*—The word "endorsement," as applied to a promissory note, necessarily implies a writing on the back of the note.

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SAME.—Pleading.—Interest.—Where, in a suit upon a promissory note, such note constitutes a cause of action against the defendant, independent of any additional agreement as to the rate of interest, endorsed thereon, a demurrer to the complaint for the want of facts will not reach any objection as to the sufficiency of the endorsement.

SAME.—Contract.—Fraud.—Upon the completion of a contract for certain work, a promissory note was executed in settlement of the amount then found to be due, upon the representations of the payee that such work had been done properly, and six months later an agreement, by the maker, to pay an additional rate of interest from the date of such agreement was endorsed upon the note. In an action upon such note by the payee against the maker, the defendant answered alleging that such work was not done according to the terms of the contract, but not alleging that the defendant did not examine the work, or had no opportunity to examine it, or that there was any concealment on the part of the plaintiff as to the character of the work, or that the defendant was in any way deceived in regard to it, or was ignorant of it at the time of or before the execution of the note or at the time of the agreement to pay the additional interest.

Held, on demurrer that the answer is insufficient.

SAME.—Admission of Endorsement in Evidence.—Practice.—The sufficiency, validity and consideration of such endorsement, as alleged in such complaint, not being called in question either by the pleadings or evidence of the defendant, he could make no valid objection to its admission in evidence.

From the Grant Circuit Court.

G. W. Harvey, for appellant.

A. Steele and R. T. St. John, for appellees.

Howk, J.—In this action, the appellees sued the appellant upon a promissory note, of which the following is a copy :

“Dec. 14th, 1876.

“Six months after date, the Marion and Monroe Gravel Road Company promise to pay Eugene Kessinger and John W. Smith the sum of eight hundred and sixty-two dollars and fifty cents (\$862.50), for value received, waiving valuation or appraisal laws of the State of Indiana, with interest at the rate of six per cent. from date.

(Signed,) “MARION AND MONROE GRAVEL ROAD COMPANY,
“By GEORGE STRANGE, President.”

The following is a copy of an endorsement on said note:

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"This note is to bear interest at the rate of ten per cent. from this date.

"June 12th, 1877. GEORGE STRANGE, President."

In their complaint, the appellees alleged, that the appellant, by George Strange, its president, "agreed, by endorsement on said note, to pay" the appellees "interest thereon at the rate of ten per cent. per annum after the 12th day of June, 1877," and that the note was due and wholly unpaid.

The appellant demurred to the complaint, for the alleged insufficiency of the facts therein to constitute a cause of action, which demurrer was overruled by the court, and to this ruling the appellant excepted.

The appellant then answered in two paragraphs, in substance as follows :

1. For answer to \$500.00 of the appellees' complaint, the appellant said that the note in suit was given by the appellant for a job of constructing 320 rods of its turnpike; that the appellees undertook and agreed to grade said pike, by grading down the hills on the line of their contract, as much as practicable, and to make a good and sufficient grade, and to make and clear out the ditches on each side of said grade, so as to carry the water off the said road, and to construct good culverts of heavy oak lumber, and make them of sufficient capacity to carry away the water which ran across said road, and the water which fell upon said road, to the extent of their line of said road, which they contracted to make and construct; that the appellees undertook to remove the stumps on the line of road so constructed by them; that the appellees had not made the grade as contracted; that the grade was not thrown up to the height agreed upon; that the hills had not been graded down at all; that the ditches made by them were not of sufficient capacity to carry off the water falling and being on the road; and that the culverts had

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been improperly constructed, in this, that the material used in making the same was unsound and decayed, and that the same were not made of sufficient capacity to carry away the water crossing said road, upon the line of their contract, which said work the appellant settled for, upon the appellees' representations that it had been done properly. Wherefore, by reason of the premises, the appellant had suffered damages in the sum of \$500.00, which the appellant asked might be set off against the sum found due on the note in suit.

2. That the appellant, prior to the time the note sued upon became due, promised and agreed that, from the 12th day of June, 1877, the said note should bear ten per cent. interest; that this agreement was made upon the consideration, referred to at the time, that the appellees were to wait upon the appellant and forbear to bring suit, in any court, to recover the amount of said note, until the 6th day of January, 1878; that the said contract was a mutual contract between the parties; and that, for this reason, the appellees ought not to maintain this action on said note. Wherefore, etc.

To the first paragraph of said answer, the appellees' demurrer, for the alleged want of sufficient facts therein, was sustained by the court, and the appellant excepted to this decision; and to the second paragraph of the answer the appellees replied by a general denial thereof.

The cause was tried by the court, and a finding was made for the appellees, in the sum of nine hundred and twenty-four dollars and seventy-eight cents, and the appellant's motions for a new trial, and in arrest of judgment, having been severally overruled by the court, and its exceptions saved to each of these rulings, judgment was rendered on the finding.

In this court, the following decisions of the court below have been assigned by the appellant as errors:

1. In overruling its demurrer to appellees' complaint;

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2. In sustaining appellees' demurrer to the first paragraph of its answer;

3. In overruling its motion for a new trial; and,

4. In overruling its motion in arrest of judgment.

The first and fourth of these alleged errors may be properly considered together, for each of them calls in question the sufficiency of the appellees' complaint, the first before, and the fourth after, the trial of the cause and the finding of the court therein. The only point made by the appellant's counsel, in discussing the sufficiency of the complaint, is, that it was not alleged therein that the indorsement on the note of the agreement to pay interest thereon at the rate of ten per cent. was in writing. Such an allegation would have been tautological; for the word "endorsement," as applied to a note, necessarily implies a writing on the back of the note. In Burrill's Law Dictionary, the word "endorsement" or "indorsement," is defined to be: "Any writing on the back of any instrument or paper." Besides, it was alleged in the complaint, that a copy of the indorsement was filed therewith, and this "copy" showed that the original thereof was in writing. In addition to this, we may remark, that even if the indorsement had not been in writing, if that were possible, the demurrer to the complaint for the want of facts would not have reached the objection of the appellant's counsel to the sufficiency of such indorsement. The note constituted a cause of action, good on the demurrer thereto, whether the indorsement thereon was valid or invalid; so that we may well conclude, as we do, that the court committed no error in overruling the demurrer to the complaint.

The second alleged error,—the sustaining of the demurrer to the first paragraph of the appellant's answer,—presents a more difficult question. It is evident, we think, from the allegations of this paragraph of answer, that the note in suit was executed by the appellant to the appellees after they had

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completed their contract for the construction of a part of the appellant's road, as alleged in said paragraph, and in settlement of the amount then found to be due from the appellant to the appellees, on account of their said contract. It was alleged by the appellant, in this first paragraph of its answer, that the appellees had not made the grade of its road as they had contracted to make it, that they had not thrown up the grade to the height agreed upon, that the hills had not been graded down at all, that the ditches constructed by them were not of sufficient capacity to carry off the water from said road, and that the culverts constructed by them were made of unsound and decayed lumber, and were not of sufficient capacity to carry away the water crossing its road, upon the line of their said contract. Notwithstanding all these failures of the appellees to fulfil their said contract, the appellant gave them the note in suit, in settlement of said contract, upon their representations that their work had been done properly; and not only so, but six months after the completion of their work and the giving of said note in settlement of said contract, the appellant agreed and promised to pay them interest on said note at the rate of ten per centum per annum. The appellant did not allege in said paragraph of its answer, that it had no opportunity, by its officers and agents, to examine and inspect the appellees' work, or that it did not examine, inspect and receive said work, or that the appellees concealed, or attempted to conceal, from the appellant, the character and qualities of their work, or that, from any cause, the appellant or its officers or agents were deceived in regard to, or were ignorant of, the character, qualities or quantity of the appellees' work under their contract, before or at the time of the execution of the note in suit, or before or at the time of its agreement and promise to pay ten per cent. interest on said note. In the absence of any such allegations, and for the want

The State v. Stewart.

of them, we are clearly of the opinion, that the first paragraph of the answer did not state facts sufficient to constitute a defence to the note in suit, or to entitle the appellant to any relief, and that the demurrer thereto was correctly sustained.

Under the third alleged error,—the overruling of the motion for a new trial,—the only point made by the appellant's counsel in argument is, that the court erred in admitting in evidence the agreement endorsed on the note in suit,—that "This note is to bear interest at the rate of ten per cent., from this date, June 12th, 1877." It was alleged in the complaint, that the appellant, by its president, executed this agreement, and this allegation was not controverted by the appellant in any manner, either by an answer, with or without oath, or by the introduction of any evidence. The appellant did not in any manner, either by its pleadings or its evidence, call in question the sufficiency, the validity, or the consideration of its agreement endorsed on the note in suit. Certainly, under the issues joined in this case, the appellant could not, as it seems to us, make any valid or sufficient objection to the admission of said agreement in evidence.

The motion for a new trial was properly overruled.

We find no error in the record.

The judgment is affirmed, at the appellant's costs.

THE STATE v. STEWART.

CRIMINAL LAW.—*Indictment for Obstructing Highway.*—*Description.*—An indictment for obstructing a public highway should describe its location with more particularity than the mere allegation that it was situated in a certain township, county and state.

From the Allen Criminal Circuit Court.

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Harper, for appellee.

appellee was indicted for obstructing a

the following words :

Accused, do hereby swear, in the following words :
I, Jacob Stewart, of the county of Allen and State of
Indiana, upon their oath, charge and present that on the
10th day of April, A. D. 1879, Jacob Stewart, of said
county of Allen and State aforesaid, unlawfully obstructed
a certain public highway in Aboit township, in said coun-
ty, by then and there erecting a fence across the said high-
way; and by then and there building and erecting said
fence in said highway ; contrary," etc.

On motion of the appellee, the court quashed the indict-
ment, and the State excepted.

The point made against the indictment is, that it does
not sufficiently describe the highway ; and we think it is
well taken. It is necessary to so describe the highway in
an indictment for obstructing it, that it may be identified
and distinguished from other highways in the same coun-
ty. It is not sufficient to describe it as a certain highway
"in said county," or "in ——— township in said county."
Such a description would put the accused on his defence
for obstructing any highway in the county or township
named. An indictment under the code of Indiana should
contain all the substantial requirements of an indictment
at the common law. The indictment before us, according
to that standard, would not be good. *The King v. The Inhab-
itants of Gamlingay*, 3 T. R. 513 ; *Rex v. The Inhabitants
of Upton-on-Severn*, 6 Car. & P. 133 ; *The State v. Harsh*, 6
Blackf. 346 ; *Mount v. The State*, 7 Ind. 654 ; *Sorele v.
The State*, 11 Ind. 492 ; *Malone v. The State*, 14 Ind. 219 ;
The State v. Buxton, 31 Ind. 67.

The judgment is affirmed.

THE STATE v. WILCOX.

LAW.—Sale made after Granting, but before Issuing, License.—Case Overruled.—Under sections 5 and 8 of the liquor law, 1 R. S. 1876, p. 871, a license to retail intoxicating liquors can not be granted for a greater or less time than one year, and the license is issued as of the date it is granted; and where the proper officers receive the applicant's money and issue his license, after the date of his license and of the grant thereof, he can not thereafter be prosecuted for a sale made after the grant, but before the issue, of his license, as for a sale made without license. To the extent of any actual conflict between the decision in this case and the cases of *Houser v. The State*, 18 Ind. 106, *Schlict v. The State*, 31 Ind. 246, and *Wiles v. The State*, 33 Ind. 206, the latter are overruled.

From the Marion Criminal Circuit Court.

T. W. Woollen, Attorney General, and *J. B. Elam*, Prosecuting Attorney, for the State.

B. F. Davis, for appellee.

Howk, J.—On the 13th day of March, 1879, the appellee, James Wilcox, was indicted in due form of law, in the court below, for unlawfully selling intoxicating liquor without a license so to do.

The indictment charged that the said sale was made on the 1st day of March, 1879. Upon the appellee's arraignment and his plea of "not guilty" as charged in the indictment, the cause was tried by the court, without a jury, and a finding was made for the appellee, and judgment was rendered accordingly.

On the trial, the State, by its attorneys, made certain offers of evidence, to the admission of which evidence the appellee, by his counsel, objected, on certain specified grounds. These objections were sustained by the court, and to these decisions the State, by its prosecuting attorney, duly excepted, and reserved the questions of law involved, for the decision of this court.

On the record of this cause, the State, by its attorneys, has assigned errors which fairly present, for the decision of this court, the reserved questions of law.

The State v. Stewart.

T. W. Woollen, Attorney General, and *S. M. Hench*, Prosecuting Attorney, for the State.

R. S. Robertson and — *Harper*, for appellee.

BIDDLE, J.—The appellee was indicted for obstructing a public highway, in the following words :

The grand jurors for the county of Allen and State of Indiana, upon their oath, charge and present that on the 10th day of April, A. D. 1879, Jacob Stewart, of said county of Allen and State aforesaid, unlawfully obstructed a certain public highway in Aboit township, in said county, by then and there erecting a fence across the said highway, and by then and there building and erecting said fence in said highway ; contrary," etc.

On motion of the appellee, the court quashed the indictment, and the State excepted.

The point made against the indictment is, that it does not sufficiently describe the highway ; and we think it is well taken. It is necessary to so describe the highway in an indictment for obstructing it, that it may be identified and distinguished from other highways in the same county. It is not sufficient to describe it as a certain highway "in said county," or "in ——— township in said county." Such a description would put the accused on his defence for obstructing any highway in the county or township named. An indictment under the code of Indiana should contain all the substantial requirements of an indictment at the common law. The indictment before us, according to that standard, would not be good. *The King v. The Inhabitants of Gamlingay*, 3 T. R. 513 ; *Rex v. The Inhabitants of Upton-on-Severn*, 6 Car. & P. 183 ; *The State v. Harsh*, 6 Blackf. 346 ; *Mount v. The State*, 7 Ind. 654 ; *Sowle v. The State*, 11 Ind. 492 ; *Malone v. The State*, 14 Ind. 219 ; *The State v. Buxton*, 31 Ind. 67.

The judgment is affirmed.

THE STATE v. WILCOX.

LIQUOR LAW.—*Sale made after Granting, but before Issuing, License.*—*Cases Overruled.*—Under sections 5 and 8 of the liquor law, 1 R. S. 1876, p. 871. a license to retail intoxicating liquors can not be granted for a greater or less time than one year, and the license is issued as of the date it is granted; and where the proper officers receive the applicant's money and issue his license, after the date of his license and of the grant thereof, he can not thereafter be prosecuted for a sale made after the grant, but before the issue, of his license, as for a sale made without license. To the extent of any actual conflict between the decision in this case and the cases of *Houser v. The State*, 18 Ind. 106, *Schlict v. The State*, 31 Ind. 246, and *Wiles v. The State*, 33 Ind. 206, the latter are overruled.

From the Marion Criminal Circuit Court.

T. W. Woollen, Attorney General, and *J. B. Elam*, Prosecuting Attorney, for the State.

B. F. Davis, for appellee.

Howk, J.—On the 13th day of March, 1879, the appellee, James Wilcox, was indicted in due form of law, in the court below, for unlawfully selling intoxicating liquor without a license so to do.

The indictment charged that the said sale was made on the 1st day of March, 1879. Upon the appellee's arraignment and his plea of "not guilty" as charged in the indictment, the cause was tried by the court, without a jury, and a finding was made for the appellee, and judgment was rendered accordingly.

On the trial, the State, by its attorneys, made certain offers of evidence, to the admission of which evidence the appellee, by his counsel, objected, on certain specified grounds. These objections were sustained by the court, and to these decisions the State, by its prosecuting attorney, duly excepted, and reserved the questions of law involved, for the decision of this court.

On the record of this cause, the State, by its attorneys, has assigned errors which fairly present, for the decision of this court, the reserved questions of law.

The State v. Stewart.

T. W. Woollen, Attorney General, and *S. M. Hench*, Prosecuting Attorney, for the State.

R. S. Robertson and — *Harper*, for appellee.

BIDDLE, J.—The appellee was indicted for obstructing a public highway, in the following words :

The grand jurors for the county of Allen and State of Indiana, upon their oath, charge and present that on the 10th day of April, A. D. 1879, Jacob Stewart, of said county of Allen and State aforesaid, unlawfully obstructed a certain public highway in Aboit township, in said county, by then and there erecting a fence across the said highway, and by then and there building and erecting said fence in said highway ; contrary," etc.

On motion of the appellee, the court quashed the indictment, and the State excepted.

The point made against the indictment is, that it does not sufficiently describe the highway ; and we think it is well taken. It is necessary to so describe the highway in an indictment for obstructing it, that it may be identified and distinguished from other highways in the same county. It is not sufficient to describe it as a certain highway "in said county," or "in ——— township in said county." Such a description would put the accused on his defence for obstructing any highway in the county or township named. An indictment under the code of Indiana should contain all the substantial requirements of an indictment at the common law. The indictment before us, according to that standard, would not be good. *The King v. The Inhabitants of Gamlingay*, 3 T. R. 513 ; *Rex v. The Inhabitants of Upton-on-Severn*, 6 Car. & P. 183 ; *The State v. Harsh*, 6 Blackf. 346 ; *Mount v. The State*, 7 Ind. 654 ; *Sowle v. The State*, 11 Ind. 492 ; *Malone v. The State*, 14 Ind. 219 ; *The State v. Buxton*, 31 Ind. 67.

The judgment is affirmed.

THE STATE v. WILCOX.

LIQUOR LAW.—*Sale made after Granting, but before Issuing, License.*—*Cases Overruled.*—Under sections 5 and 8 of the liquor law, 1 R. S. 1876, p. 871, a license to retail intoxicating liquors can not be granted for a greater or less time than one year, and the license is issued as of the date it is granted; and where the proper officers receive the applicant's money and issue his license, after the date of his license and of the grant thereof, he can not thereafter be prosecuted for a sale made after the grant, but before the issue, of his license, as for a sale made without license. To the extent of any actual conflict between the decision in this case and the cases of *Houser v. The State*, 18 Ind. 106, *Schliet v. The State*, 31 Ind. 246, and *Wiles v. The State*, 33 Ind. 206, the latter are overruled.

From the Marion Criminal Circuit Court.

T. W. Woollen, Attorney General, and *J. B. Elam*, Prosecuting Attorney, for the State.

B. F. Davis, for appellee.

Howk, J.—On the 18th day of March, 1879, the appellee, James Wilcox, was indicted in due form of law, in the court below, for unlawfully selling intoxicating liquor without a license so to do.

The indictment charged that the said sale was made on the 1st day of March, 1879. Upon the appellee's arraignment and his plea of "not guilty" as charged in the indictment, the cause was tried by the court, without a jury, and a finding was made for the appellee, and judgment was rendered accordingly.

On the trial, the State, by its attorneys, made certain offers of evidence, to the admission of which evidence the appellee, by his counsel, objected, on certain specified grounds. These objections were sustained by the court, and to these decisions the State, by its prosecuting attorney, duly excepted, and reserved the questions of law involved, for the decision of this court.

On the record of this cause, the State, by its attorneys, has assigned errors which fairly present, for the decision of this court, the reserved questions of law.

The State v. Stewart.

T. W. Woollen, Attorney General, and *S. M. Hench*, Prosecuting Attorney, for the State.

R. S. Robertson and — *Harper*, for appellee.

BIDDLE, J.—The appellee was indicted for obstructing a public highway, in the following words :

The grand jurors for the county of Allen and State of Indiana, upon their oath, charge and present that on the 10th day of April, A. D. 1879, Jacob Stewart, of said county of Allen and State aforesaid, unlawfully obstructed a certain public highway in Aboit township, in said county, by then and there erecting a fence across the said highway, and by then and there building and erecting said fence in said highway ; contrary," etc.

On motion of the appellee, the court quashed the indictment, and the State excepted.

The point made against the indictment is, that it does not sufficiently describe the highway ; and we think it is well taken. It is necessary to so describe the highway in an indictment for obstructing it, that it may be identified and distinguished from other highways in the same county. It is not sufficient to describe it as a certain highway "in said county," or "in ——— township in said county." Such a description would put the accused on his defence for obstructing any highway in the county or township named. An indictment under the code of Indiana should contain all the substantial requirements of an indictment at the common law. The indictment before us, according to that standard, would not be good. *The King v. The Inhabitants of Gamlingay*, 3 T. R. 513 ; *Rex v. The Inhabitants of Upton-on-Severn*, 6 Car. & P. 183 ; *The State v. Harsh*, 6 Blackf. 346 ; *Mount v. The State*, 7 Ind. 654 ; *Sowle v. The State*, 11 Ind. 492 ; *Malone v. The State*, 14 Ind. 219 ; *The State v. Buxton*, 31 Ind. 67.

The judgment is affirmed.

THE STATE v. WILCOX.

LIQUOR LAW.—*Sale made after Granting, but before Issuing, License.*—*Cases Overruled.*—Under sections 5 and 8 of the liquor law, 1 R. S. 1876, p. 871, a license to retail intoxicating liquors can not be granted for a greater or less time than one year, and the license is issued as of the date it is granted; and where the proper officers receive the applicant's money and issue his license, after the date of his license and of the grant thereof, he can not thereafter be prosecuted for a sale made after the grant, but before the issue, of his license, as for a sale made without license. To the extent of any actual conflict between the decision in this case and the cases of *Houser v. The State*, 18 Ind. 106, *Schlict v. The State*, 31 Ind. 246, and *Wiles v. The State*, 33 Ind. 206, the latter are overruled.

From the Marion Criminal Circuit Court.

T. W. Woollen, Attorney General, and *J. B. Elam*, Prosecuting Attorney, for the State.

B. F. Davis, for appellee.

Howk, J.—On the 13th day of March, 1879, the appellee, James Wilcox, was indicted in due form of law, in the court below, for unlawfully selling intoxicating liquor without a license so to do.

The indictment charged that the said sale was made on the 1st day of March, 1879. Upon the appellee's arraignment and his plea of "not guilty" as charged in the indictment, the cause was tried by the court, without a jury, and a finding was made for the appellee, and judgment was rendered accordingly.

On the trial, the State, by its attorneys, made certain offers of evidence, to the admission of which evidence the appellee, by his counsel, objected, on certain specified grounds. These objections were sustained by the court, and to these decisions the State, by its prosecuting attorney, duly excepted, and reserved the questions of law involved, for the decision of this court.

On the record of this cause, the State, by its attorneys, has assigned errors which fairly present, for the decision of this court, the reserved questions of law.

The State v. Stewart.

T. W. Woollen, Attorney General, and *S. M. Hench*, Prosecuting Attorney, for the State.

R. S. Robertson and — *Harper*, for appellee.

BIDDLE, J.—The appellee was indicted for obstructing a public highway, in the following words :

The grand jurors for the county of Allen and State of Indiana, upon their oath, charge and present that on the 10th day of April, A. D. 1879, Jacob Stewart, of said county of Allen and State aforesaid, unlawfully obstructed a certain public highway in Aboit township, in said county, by then and there erecting a fence across the said highway, and by then and there building and erecting said fence in said highway ; contrary," etc.

On motion of the appellee, the court quashed the indictment, and the State excepted.

The point made against the indictment is, that it does not sufficiently describe the highway ; and we think it is well taken. It is necessary to so describe the highway in an indictment for obstructing it, that it may be identified and distinguished from other highways in the same county. It is not sufficient to describe it as a certain highway "in said county," or "in ——— township in said county." Such a description would put the accused on his defence for obstructing any highway in the county or township named. An indictment under the code of Indiana should contain all the substantial requirements of an indictment at the common law. The indictment before us, according to that standard, would not be good. *The King v. The Inhabitants of Gamlingay*, 3 T. R. 513 ; *Rex v. The Inhabitants of Upton-on-Severn*, 6 Car. & P. 133 ; *The State v. Harsh*, 6 Blackf. 346 ; *Mount v. The State*, 7 Ind. 654 ; *Sowle v. The State*, 11 Ind. 492 ; *Malone v. The State*, 14 Ind. 219 ; *The State v. Buxton*, 31 Ind. 67.

The judgment is affirmed.

THE STATE v. WILCOX.

LIQUOR LAW.—*Sale made after Granting, but before Issuing, License.*—*Cases Overruled.*—Under sections 5 and 8 of the liquor law, 1 R. S. 1876, p. 871, a license to retail intoxicating liquors can not be granted for a greater or less time than one year, and the license is issued as of the date it is granted; and where the proper officers receive the applicant's money and issue his license, after the date of his license and of the grant thereof, he can not thereafter be prosecuted for a sale made after the grant, but before the issue, of his license, as for a sale made without license. To the extent of any actual conflict between the decision in this case and the cases of *Houser v. The State*, 18 Ind. 106, *Schlict v. The State*, 81 Ind. 246, and *Wiles v. The State*, 33 Ind. 206, the latter are overruled.

From the Marion Criminal Circuit Court.

T. W. Woollen, Attorney General, and *J. B. Elam*, Prosecuting Attorney, for the State.

B. F. Davis, for appellee.

Howk, J.—On the 13th day of March, 1879, the appellee, James Wilcox, was indicted in due form of law, in the court below, for unlawfully selling intoxicating liquor without a license so to do.

The indictment charged that the said sale was made on the 1st day of March, 1879. Upon the appellee's arraignment and his plea of "not guilty" as charged in the indictment, the cause was tried by the court, without a jury, and a finding was made for the appellee, and judgment was rendered accordingly.

On the trial, the State, by its attorneys, made certain offers of evidence, to the admission of which evidence the appellee, by his counsel, objected, on certain specified grounds. These objections were sustained by the court, and to these decisions the State, by its prosecuting attorney, duly excepted, and reserved the questions of law involved, for the decision of this court.

On the record of this cause, the State, by its attorneys, has assigned errors which fairly present, for the decision of this court, the reserved questions of law.

The State v. Wilcox.

We will set out so much of the record as we think is necessary to the proper presentation of the question reserved by the State, and to a proper understanding of our decision thereof.

On the trial of the cause, the parties agreed to certain facts, as follows:

“It is agreed by the parties to this cause, that James Wilcox, the defendant mentioned in the indictment in said cause, did make the sale of intoxicating liquor, for the purpose of gain, as alleged in said indictment, and that said sale was made on the day, to the person, for the price and in the county and state mentioned and alleged in said indictment; that said Wilcox had a license authorizing him to retail intoxicating liquors of the kind sold in this case, at the place where the said sale was made, and that said license bore date on the 7th day of January, 1879, and licensed him to sell intoxicating liquors for one year thereunder.”

After the parties had agreed to the above recited facts, upon the trial of this cause, the State, by its attorneys, offered to prove the following further facts, in regard to the appellee's license:

“That, in the latter part of the year 1878, the defendant, being a male resident of said county of Marion, and a person having the right to retail intoxicating liquors therein upon procuring a proper license as provided by law, published his notice of an intention to apply for said license at the January term of the board of commissioners of said county, to be held on the first Monday in January, 1879; that he presented his said application on the 6th day of January, 1879, to the said board, and filed therewith the bond required by law, which was accepted; and said board, on said day, ordered said license to issue, upon the payment of one hundred dollars to the county treasurer of said county of Marion, Indiana, as the license fee required by

law; and on the 7th day of the said month of January, 1879, said Wilcox obtained from the auditor of said county an order authorizing the treasurer of said county to receive said fee; and said auditor then filled out said license, dating it on the said 7th day of January, 1879, and laid it aside in his office to await the said treasurer's receipt for the said license fee; and on the said day said Wilcox went to the said treasurer's office and paid him the sum of twenty-five dollars (\$25), as part of said license fee, and said treasurer made a memorandum thereof; and on the 10th day of February, 1879, said defendant paid to said treasurer fifteen dollars (\$15) more, to be applied in the same way; and on the 7th day of March, 1879, said defendant paid the remainder of said one hundred dollars (\$100) license fee to the said treasurer, and obtained his receipt therefor, and carried the said receipt for said one hundred dollars (\$100) to said auditor and obtained, upon delivering said receipt to the said auditor, his said license, which had been filled up and bore date as aforesaid."

The appellee, by his counsel, objected to the admission of the foregoing facts, offered by the State in evidence, for the reasons that they were immaterial and irrelevant, and could not invalidate his said license, or take away the authority conferred thereby, which objection was sustained by the court, and to this ruling the State, by its attorney, at the time excepted, and reserved the question for the decision of this court. The State, by its counsel, then offered to prove the following additional facts:

"That, on the 3d day of March, 1879, the grand jury of said county, and of the court wherein this indictment is now pending, met in session to inquire into violations of law, in said county, of which said court had jurisdiction, and were informed that said defendant, Wilcox, had been retailing liquors, at the place mentioned in his application for a license, for some weeks, and had taken out no license

The State v. Wilcox.

authorizing him to do so, and thereupon subpoenaed a number of witnesses who, they believed, could testify as to sales of intoxicating liquor by said Wilcox, and between the said 3d day of March, 1879, and the 6th day of March following, examined before them a large number of witnesses, touching such sales, and among them were several who were and had been employed at the said Wilcox's place, and who were his daily associates; that, before the 7th day of March, 1879, said investigation of said grand jury was complete, and the evidence before them, upon which the indictment in this case was returned; that the said Wilcox, from said witnesses, learned what was going on before said grand jury, or at least that they were investigating his sales of intoxicating liquor, and thereupon and by reason of said information went to the treasurer's office and paid the remainder of his license fee and procured his license, as shown in the testimony above offered; but that, by reason of press of business, the indictments ordered by the grand jury were not prepared by the prosecuting attorney of this court for some days after their said investigation was complete, and said indictments were not returned into court until said grand jury was ready to report upon other matters also; and this, with many other indictments, and other matters, were so returned into court on the 13th day of March, 1879."

To the admission of these additional facts in evidence, the appellee objected upon the ground that they were irrelevant, immaterial and incompetent, and should not be received as affecting any sale made by the appellee, after the date, or during the period, of his license, which objection was sustained by the court, and to this ruling the State, by its attorney, excepted, and reserved the question for the decision of this court.

From the foregoing statement of this case, as shown by the record, it will be seen that the State, by its attorney,

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has reserved two questions of law for our decision; but these two questions are so closely connected, that they may be properly considered together. We may premise, that our decision of those questions can have no possible bearing upon the case at bar; but we are required "to pronounce an opinion" upon the questions reserved, which opinion "shall be binding upon the inferior courts, and shall be a uniform rule of decision therein." 2 R. S. 1876, p. 405, sec. 119.

It will be observed, from our statement of this case, that on the trial the State admitted, that the appellee, Wilcox, had a license authorizing him to retail intoxicating liquors, of the kind sold in this case, at the place where the sale was made, and that this license bore date the 7th day of January, 1879, and authorized him to make such sales for and during one year from and after said last named day. This license, by its terms, expressly authorized the appellee to make the identical sale, on the 1st day of March, 1879, on which the indictment in this case is predicated. It will also be observed, that the State, after its admission that the appellee had a license which authorized him to make the identical sale charged in the indictment, offered to prove the two separate and distinct sets of facts above recited. The evident object and purpose of each of these sets of facts, as offered by the State in evidence, were to obviate the effect of the State's admission, to contradict the terms of the appellee's license, to the extent of showing that it did not bear the true date of its issue, and that it did not, as it purported to do, authorize the appellee to retail intoxicating liquors for one year from and after its said date of January 7th, 1879, and to show by parol evidence, that while, on its face, the license was for one year from and after its date, yet it was in fact only a license for ten months from and after the 7th day of March, 1879.

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From what we have said it will be readily seen that the main question for decision in this case is almost identical with the question which was fully considered and decided by this court in the recent case of *Vannoy v. The State*, 64 Ind. 447. Indeed, this is conceded by the learned counsel of the State in their argument of the case at bar; and, therefore, they have asked us "to limit the scope" of the case of *Vannoy v. The State*, "modify it, or overrule it altogether." In the case cited, it appeared that Vannoy had, in due form of law, obtained an order from the proper board of commissioners granting him a license to retail intoxicating liquors, at a certain place, for and during one year from and after the date of said order, upon the payment of the license fee required by the statute, and that he had, on and before the date of said order, strictly and literally complied with all the requirements of the statute, *except* as to the payment of such license fee; that he had neglected to pay such license fee for more than six months after the date of the order granting him such license, and had then paid the fee and obtained from the proper officer his license, of the same date as the date of the order granting it, and for the term of one year from and after said date; and that, during the time intervening between the date of said order and the date of the manual delivery to him of his license, upon his payment of the fee therefor, he made the sale upon which the indictment against him was predicated; and that this indictment had not been found and returned against him, until some time after his payment of said fee and his actual possession of the license, which, by its terms, expressly authorized him to make the sale charged in said indictment. This was substantially the case against Vannoy, and it is evident, we think, that there is no material difference between that case and the case at bar, as it would have been if the facts offered by the State had been admitted in evidence.

In the Vannoy case, it was held by this court, that where a retailer of intoxicating liquors had made a sale without license, and therefore an unlawful sale, he could not be indicted and punished for such sale, *after* he had received a license, issued in conformity with law and by the proper officer, which license, by its terms, covered the precise time and place when and where such sale was made, and expressly authorized him to make such sale at such time and place. In other words, it was held in that case, that after a sale without license, and therefore an illegal sale, by a retailer of intoxicating liquors, the subsequent payment and receipt of the license fee, and the subsequent issue to such retailer, by competent authority and in conformity with law, of a license covering the precise time and place of such sale, and expressly authorizing such sale, would so far legalize such unlawful sale as to relieve such retailer from the penalties prescribed by the statute, in any prosecution for such offence, subsequent to the issue of such license.

It seems to us that the doctrine of the case cited is just and right, and is in strict harmony with the provisions of the statute; while a contrary doctrine might, in some instances, work injustice and oppression. We are not inclined either to limit the scope of the Vannoy case, or to modify it, and certainly not to overrule it, for it still meets the approval of our judgments. The law of this State recognizes the sale by retail of intoxicating liquors as a lawful business, in which good and lawful men may lawfully engage. The business, however, is of such a nature that the law-making power of this State has seen fit to provide, by positive enactment, that those persons who may engage therein shall pay a certain sum of money into the county treasury, for a license, which will authorize them to pursue the business, under certain specified restraints, for a certain period of time. The statute regulating the sale of

The State v. Wilcox.

intoxicating liquors has placed the business of selling by retail under the power and control of the different officers of the county, prescribing the duties of the several county officers, in connection with the business. The board of county commissioners may grant license to sell by retail intoxicating liquors, upon the applicant's giving bond to the approval of the county auditor; but, after this grant, the applicant "shall pay the treasurer of said county one hundred dollars, as a license fee for one year, before license shall issue to him." 1 R. S. 1876, p. 871, sec. 5.

In section 8 of the statute, it is provided that no license "shall be granted for a greater or less time than one year."

It will be seen from these statutory provisions, that the fee of one hundred dollars pays for one year's license, and that the license can not be granted for a greater or less time than one year. The license is issued as of the date of the grant, and runs for one year from that date. If the county officers receive the applicant's money and give him his license two months, as in this case, or six months, as in the Vannoy case, after the date of the license and of the grant thereof, it seems to us that he can not thereafter be prosecuted for a sale made after the grant, but before the issue of such license, as a sale made without license, without doing violence to the plainest principles of right and justice. If the appellee, in this case, could be indicted and convicted after the 7th day of March, 1879, for a sale made before that day and after the 7th day of January, 1879 as a sale made without license, the practical result would be that his license, though nominally issued for one year, would only cover a period of ten months, and the fee of one hundred dollars, paid by him for one year's license, and one year's immunity from criminal prosecutions for sales, without license, would actually afford him such license and immunity for and during the period of ten

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months only. Such a result, we think, would be manifestly wrong and unjust, and is not contemplated by any of the provisions of the statute.

In our opinion, the facts offered in evidence by the State, in this case, were immaterial and incompetent, and the court committed no error in excluding them.

We are aware that the conclusion we have reached in this case is not in apparent harmony with the decisions of this court in the cases of *Houser v. The State*, 18 Ind. 106, *Schlict v. The State*, 31 Ind. 246, and *Wiles v. The State*, 33 Ind. 206. These cases were decided when other statutes were in force, regulating the sale of intoxicating liquors; but, in so far as the questions involved in this case are concerned, these other statutes did not differ substantially from the act now in force, on the same subject. To the extent of any actual conflict between our decision, in the case at bar, and the decisions in the cases cited, the latter are overruled.

The appeal of the State, in this case, is not sustained.

NIBLACK, J.—As the facts agreed upon in this case entitled the appellee to an acquittal, I concur with my associates in holding that the additional evidence offered by the prosecuting attorney was inadmissible, but I do not wish to be understood as agreeing that a party can enjoy the immunity which a license to sell intoxicating liquors affords, until he has fully complied with all the conditions entitling him to receive a license, and has actually received his license. See *Vannoy v. The State*, *supra*.

WHISTLER v. TEAGUE.

CONVERSION.—*Evidence*.—*Practice*.—On the trial of an action for the conversion of lumber, wherein the plaintiff has given no evidence concerning lumber in the defendant's possession, the latter will not be permitted to

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prove the kind and quality of lumber in his possession and how he obtained it, as evidence that it is not the lumber in controversy.

SAME.—*Excessive Damages.*—*Supreme Court.*—Where the evidence is conflicting, the Supreme Court will not disturb the verdict, even though the damages assessed seem too large.

SAME.—*New Trial.*—*Affidavits.*—*Misconduct of Juror.*—Affidavits in support of and against a motion for a new trial on the ground of the misconduct of a juror may be allowed by the circuit court; and the Supreme Court will not disturb the decision of the court below upon any other principle than that upon which it will disturb the verdict of a jury for the want of sufficient evidence to support it.

SAME.—*Objection to Evidence must be Pointed Out.*—In order that a question may be saved in the record regarding the admission of evidence, the grounds of objection thereto must be pointed out at the time objection is made.

From the Wabash Circuit Court.

A. Taylor, for appellant.

C. Cowgill, *H. B. Shiveley* and *C. E. Cowgill*, for appellee.

BIDDLE, J.—Complaint by the appellee, averring that the appellant wrongfully took and converted to his own use ten thousand feet of lumber, of the property of the appellee, and of the value of one hundred and fifty dollars.

Answer, general denial.

Trial by jury; verdict for appellee.

By a motion for a new trial, the appellant has reserved several questions, and by an appeal has presented them to this court for decision. They will be noticed in the order they are discussed in the brief of counsel for the appellant.

1. That the damages are excessive; and,
2. That the verdict is not sustained by sufficient evidence.

These two questions may be considered together. We have read the evidence. It will sustain the finding in favor of the appellee, if the jury chose to give credit to the witnesses called by the appellee rather than those called by the appellant; and they could better decide this ques-

tion from the statement of the witnesses before them, than we can from their words on paper. The damages seem large to us, but we can not disturb the verdict, under the well known rule which governs appellate courts upon questions of the sufficiency of evidence.

3. The appellant offered to prove the kind and quality of fencing lumber upon his farm and in his possession, and that it was not the kind or quality of the lumber in controversy, and to show where he obtained it. The appellee objected to the evidence, and the court sustained the objection. Of this ruling the appellant complains.

This evidence was offered after the appellee had rested his case in chief. He had offered no evidence touching the character of the lumber on the appellant's farm, or in his possession, to identify it as being the lumber alleged to have been taken from the appellee. The evidence offered was, therefore, properly rejected. There was nothing in the case to which it was rebutting, and it could not be given to support the defence affirmatively. Such a rule would put it in the power of the appellant to manufacture evidence in his own defence.

4. One of the witnesses on behalf of appellee testified that he saw Ephraim Whistler, a minor, son of the appellant, at the pile of lumber owned by the appellee, with his father's team, loading the lumber on the wagon, and that "Ephraim said his father had made some arrangement with Teague" (the appellee) "to get this lumber to build a line fence."

To this evidence the appellant objected, but did not point out what his objections were.

Subsequently, the same witness testified to the same state of facts more fully, to which no objection at all was made. In this state of the record we can not say that the court erred in admitting the evidence to go to the jury.

5. One of the causes assigned for a new trial was the

The Board of Commissioners of Marion County v. Reissner et al.

misconduct of one of the jurors that tried the case. This cause was supported by several affidavits, against which the court allowed counter affidavits, and, upon this evidence, held that the alleged misconduct was not proved.

Of this ruling the appellant complains, and also of the practice of allowing counter affidavits in such cases. But the practice is well settled against the views of the appellant; and we have frequently held, in such cases, that we can not disturb the conclusion of the court below upon any other principle than that upon which we disturb a verdict of a jury for want of sufficient evidence to support it. Viewed in this light, we can not interfere with the finding of the court upon this question. *Holloway v. The State*, 53 Ind. 554; *Beard v. The State*, 54 Ind. 413; *McCulley v. The State*, 62 Ind. 428.

None of the remaining causes assigned for a new trial were discussed in the brief of appellant, and they are therefore held as waived.

The judgment is affirmed, at the costs of the appellant.

Petition for a rehearing overruled.

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THE BOARD OF COMMISSIONERS OF MARION COUNTY v.
REISSNER ET AL.

BOARD OF COMMISSIONERS.—*Liability to Sheriff for Articles Purchased for Jail.*—The board of commissioners of a county in this State are liable to the sheriff of such county, for the price of brooms and mops purchased by him and used in keeping the county jail clean.

From the Marion Superior Court.

J. T. Dye and *A. C. Harris*, for appellant.

N. B. Taylor, *F. Rand* and *E. Taylor*, for appellees.

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PERKINS, J.—The appellant, in its brief in this cause, says :

“ There is but a single question in this case, so that no extended review of the record is necessary. The case comes up on the special findings and conclusions of law.

“ While Reissner was sheriff of Marion county, he purchased, on his own account, and paid for certain brooms and mops, to be, and which were, used by him in keeping the jail clean. After his term of office expired, he filed his account ” (for the same) “ before the board ” (of commissioners of the county). “ It was disallowed. The Superior Court, on appeal, at both special and general term, allowed the claim against the county, on the authority of the case between the same parties, reported in 58 Ind. 260.”

We quote the opening paragraphs of the opinion in that case :

“ Action by the appellee, against the appellant ” (in the Marion Superior Court), “ to recover the value of certain candles, brooms, mops and coal, purchased by the plaintiff as sheriff of the county, for the use of the jail thereof, necessary therefor and used therein, during the year 1875, amounting to one hundred and sixty-five dollars and fifty cents.

“ Trial by the court ; special finding, and judgment for plaintiff at special term ; affirmed at general term.”

(This judgment included the price of the brooms, mops and candles).

“ The question arising in the case, as stated in the opinion of the court below at general term, is, whether a county sheriff is entitled to recover from the county for mops, brooms, coal and candles which were necessary for use in the county jail, purchased by him for such use, and used in cleaning, heating and lighting the jail of the county.

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"The appellant, we infer, does not contest the matter of the brooms, mops and candles, as, in the brief of counsel for the board, the question is stated to be, 'whether the board of commissioners shall pay for the fuel for the county jail, in addition to paying the fees allowed by the statute to the sheriff, to be paid out of the county treasury.'"

The judgment of the superior court was affirmed by the Supreme Court. It thus appears that the judgment of the superior court was affirmed for the price of the brooms, mops and candles, without opposition from the board of commissioners.

From the foregoing statement it is manifest that the question now raised in the case at bar was decided in the case of *The Board of Comm'rs, etc., v. Reissner*, 58 Ind. 260; and, hence, that the superior court did not err in deciding the present upon the authority of that case.

We adhere to the decision in the case cited, and are satisfied that, in principle as well as in character of articles, it covers the claim in the present case.

The judgment is affirmed, with costs.

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TERRELL ET AL. v. THE STATE, EX REL. GRUBBS ET AL.

ESTOPPEL—*Withdrawal of Appearance.*—*Default.*—*Pleading.*—*Practice.*—*Supreme Court.*—The facts that a demurrer by the defendant to the complaint is overruled, and that he then withdraws his appearance and makes default, without reserving any exception to the decision upon the demurrer, do not estop him from questioning the sufficiency of the complaint in the Supreme Court, where the case stands as if no demurrer had been filed.

SAME.—*Waiver.*—*Jurisdiction.*—The doctrine of waiver, as applicable to questions ordinarily arising during the progress of a cause, does not apply

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to questions of jurisdiction over the subject-matter of the action, nor to the sufficiency of the facts set up in the complaint.

EXECUTION.—Duty of Officer Holding.—*All Property of Debtor prima facie Subject to.*—*Exemption.*—Under the statutory provisions bearing upon the seizure and sale of property upon execution, construed together, all the property of execution defendants in this State is, *prima facie*, subject to execution, and it is the duty of an officer holding an execution to proceed until some claim for exemption is lawfully interposed.

SAME.—Action against Officer for Failing to Levy.—*Defence.*—In an action against a sheriff for failing to levy upon property, it may be shown in defence that the property was exempt from levy and sale; but, to avail as a defence, such exemption must be affirmatively shown.

SAME.—Averment as to Value of Property.—In such case, an averment in the complaint, that the execution defendant, at the time the execution was in the sheriff's hands, "owned a large amount of both real and personal property,—more than enough to pay and satisfy said execution," is equivalent to an averment that such property was of some value, and of greater aggregate value than the amount of the relator's judgment.

SAME.—What constitutes Service of Execution.—The service of an execution is the communication of its contents to the execution defendant, accompanied by or followed with a demand for its satisfaction, and in its natural order precedes the levy of the execution.

From the Howard Circuit Court.

N. R. Lindsay, for appellants.

M. Bell, C. E. Hendry and *M. McDowell*, for appellees.

NIBLACK, J.—This was an action by the State, on the relation of John W. Grubbs and Elijah R. Harvey, against John H. Terrell, Richmond Terrell, Hezekiah H. Winslow, John M. Leach, Lee H. Hillis and Addison F. Armstrong, on a sheriff's bond executed by the said John H. Terrell as principal, and the other defendants as his sureties, and against David O. Freeman as the sheriff of Howard county, and as the successor in office of the said John H. Terrell.

The defendants demurred to the complaint, but their demurrer being overruled, they withdrew their appearance and made default, without reserving any exception to the decision of the court upon their demurrer.

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The court assessed the plaintiffs' damages at the sum of five hundred and thirty-nine dollars, and rendered judgment for that sum against the defendants.

The only error assigned in this court is upon the alleged insufficiency of facts set up in the complaint to sustain the action.

After alleging the execution, and setting out the substance, of the bond sued upon, the complaint proceeded, in substance as follows :

"The relators further aver, that on the 19th day of June, 1876, they recovered a judgment in the Howard Circuit Court, against William H. Hendrickson and John M. Moulder, principals, and Kinley A. Carr and George I. Gordon, as sureties, for the sum of four hundred and thirty-seven dollars and five cents and costs, which judgment is still wholly unpaid, in full force and unappealed from ; that, on the 27th day of said month, the relators caused execution to duly issue upon said judgment, which on the same day came into the hands of said Terrell as such sheriff, for service, commanding him to levy the same and make said sum of money, principal, interest and costs, of the property of said execution defendants, in said county, subject to execution, and have the money at the clerk's office to satisfy said judgment, interest and costs, within one hundred and eighty days from the date of said execution.

"The relators further aver, that there have been breaches of the conditions of said bond by said Terrell, in this, to wit :

"First. Said John H. Terrell neglected, and carelessly failed and refused, to serve said execution upon the defendants mentioned therein in said county of Howard, and failed and refused to levy the same upon property, and failed and refused to offer property for sale thereon, within sixty days after such execution came into his hands,

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although said execution was wholly unpaid, and said execution defendants, during all said period of sixty days, had and owned a large amount of both real and personal property, more than enough to pay and satisfy said execution, in the said county of Howard, which fact was well known to said Terrell; and although neither of the relators, their agents or attorneys, at any time directed said Terrell to hold said execution, or delay proceedings thereon; nor did said Terrell make any effort to collect said execution during the time he so held the same, up to the 7th day of November, 1876; that, by reason of said neglect and failure of said sheriff to levy and sell said property, the same was disposed of by said execution defendants, and the relators have sustained damages thereby, and by reason thereof, in the sum of six hundred dollars.

“The relators further say that on the 7th day of November, 1876, the defendant David O. Freeman received said execution from said Terrell, whose term of office as such sheriff had expired on said day; that said Freeman, on the 24th day of January, 1877, and long after the lifetime of said execution, returned the same with the following endorsement thereon, to wit: ‘January 24th, 1877. I return this writ not satisfied. Hendrickson and Moulder set off; ordered held, as to the others.

“‘D. O. FREEMAN, Sheriff.’

“The relators further say that said return of the said Freeman is false in this, to wit, that the relators, nor their attorneys, at any time ordered said writ held as to the execution defendant Kinley A. Carr, but repeatedly ordered said sheriff to proceed with the writs in his hands, against said Carr. Wherefore the relators say that they demand judgment against said David O. Freeman for the correction of said return on said execution, according to the facts in the case, and that they have judgment against the defendants for six hundred dollars and proper relief.”

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It is objected, on behalf of the appellee, that the rule allowing a complaint to be first attacked in this court for an alleged insufficiency of facts to constitute a cause of action applies only to cases in which no demurrer was filed in the court below, and not to cases like this one, where a demurrer was filed to the complaint, and no exception was reserved to the decision of the court overruling the demurrer, and that the appellants, having waived any objection to that decision, are now estopped from again raising the question of the sufficiency of the complaint in this court.

We are of the opinion, however, that this case stands practically as if no demurrer had been filed to the complaint below. The doctrine of waiver thus contended for, and as applicable to questions ordinarily arising during the progress of a cause, does not apply to questions of jurisdiction over the subject-matter of the action, nor to the sufficiency of the facts set up in the complaint. *Buskirk Practice*, 171; *Davis v. Perry*, 41 Ind. 305.

The objections urged by the appellants to the sufficiency of the complaint before us are:

1st. That it was not expressly alleged that the execution defendants had property *subject to execution* while Terrell, as sheriff, had the execution in his hands;

2d. That it was not alleged that the property of the execution defendants, upon which Terrell failed to levy, was of any value.

Section 411, 2 R. S. 1876, p. 198, providing that an execution against the property of a judgment debtor "shall require the sheriff to satisfy the judgment out of the property of the debtor, subject to execution," is quoted to sustain the first objection; and section 481, 2 R. S. 1876, p. 221, which says: "If any sheriff shall neglect or refuse to levy upon or sell any property, justly liable to execution, when the same might have been done, he shall

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be amerced to the value of such property, not to exceed the amount necessary to satisfy the execution," is quoted to sustain the second objection. But we can not regard either of these objections as well taken.

In this State, the exemption of property from execution is a mere personal privilege, to which the execution defendant must make some claim before it will be conceded, and to which only a limited class of judgment debtors, known as householders, are entitled. Then, again, it is only upon judgments founded upon contracts, that any execution defendant is entitled to an exemption. 2 R. S. 1876, p. 352; Freeman Executions, sec. 211.

Construing together all the statutory provisions bearing upon the seizure and sale of property upon execution, the inference is obvious, that all the property of execution defendants in this State is considered as *prima facie* subject to execution, and that it is the duty of the officer holding an execution to proceed until some claim for exemption is lawfully interposed. Freeman Executions, *supra*; Daugherty Sheriffs, 112.

It may be said that, with us, liability to execution is the rule and exemption the exception, as applicable to the property of execution defendants. In an action against a sheriff for failing to levy upon property, it may be shown in defence, that the property was exempt from levy and sale; but, to avail as a defence, such exemption must be affirmatively shown. Crocker Sheriffs, sec. 853.

The averment in the complaint that the execution defendants, at the time the execution was in Terrell's hands, "owned a large amount of both real and personal property, —more than enough to pay and satisfy said execution," was, we think, equivalent to an averment that such property was of some value, and of a greater aggregate value than the amount of the relators' judgment.

The question is made upon the argument, as to what

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constitutes service of an execution, as contradistinguished from a levy of such execution upon property. the service of an execution and the levy of an execution are often referred to as convertible terms ; but, in strictly legal parlance, the service of an execution may be said to be the communication of its contents to the execution defendant, accompanied by, or followed with, a demand for its satisfaction, and in its natural order precedes the levy of the execution. 2 R. S. 1876, p. 205, sec. 433 ; *Godman v. Smith*, 17 Ind. 152.

No question seems to have been made below, either as to the joinder of causes of action or of party defendants.

The judgment is affirmed, with costs.

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156	22

MORTGAGE.—*Parol Evidence not Admissible to show that a Chattel Mortgage is an absolute Sale.*—Where a written instrument transfers personal property from C. to D., to be re-transferred, upon payment of a certain sum of money within a specified time, such instrument is, upon its face, a mortgage ; and parol evidence is not admissible to show that it was an absolute sale.

BILL OF EXCEPTIONS.—*Admission.—Evidence.—Supreme Court.*—Facts may be admitted in a bill of exceptions, as facts, but when not so admitted the evidence which tends to prove or disprove them must be set out ; and where neither the evidence nor any question of law occurring on the trial is in the record, the Supreme Court can not say that the finding is contrary to law.

CONVERSION.—*Demand.—Motion to make Certain.—Demurrer.*—When a conversion is alleged in a pleading, no demand need be averred ; and, if the complaint shows that the defendant wrongfully converted the property to his own use, it is sufficient without showing that he wrongfully received or wrongfully retains such property ; and, if such complaint fails to give a sufficient bill of particulars, the defect can be reached, not by demurrer, but by motion to make more certain.

SAME.—Harmless Error.--When the facts stated in a paragraph of answer may be given in evidence under the general denial, which is pleaded, it is a harmless error to sustain a demurrer to such paragraph.

From the Elkhart Circuit Court.

J. M. Vanfleet, J. M. Coombs, J. Morris and R. C. Bell,
for appellant.

J. H. Baker and J. A. S. Mitchell, for appellee.

BIDDLE, J.—Complaint in two paragraphs, by the appellee, against the appellant, charging him with the wrongful sale and conversion of certain stock in the Elkhart Hydraulic Company, the dividends thereon, and other property therein described, belonging to the appellee.

A separate demurrer to each paragraph, alleging the insufficiency of the facts averred to constitute a cause of action, was overruled, and exceptions reserved.

Answer, a general denial and three special paragraphs.

Separate demurrers to the second and third paragraphs of answer, alleging as ground the insufficiency of the facts stated to constitute a defence, were sustained, and exceptions reserved. Reply to the fourth paragraph. Trial by the court; finding for appellee.

The appellant filed his motion for a new trial, based upon the following causes :

- "1. The damages assessed are excessive;
- "2. The amount recovered was excessive and too large;
- "3. The finding and decision of the court is not sustained by the evidence, and is contrary to law; and,
- "4. Error of law occurring at the trial and duly excepted to, in this, to wit: In refusing to hear the evidence of M. F. Shuey, which the defendant offered, as set forth in his bill of exceptions, at the time."

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The motion for a new trial was overruled, and exceptions reserved.

The first cause is well assigned. The second is the same as the first. The third contained two specifications as to what the evidence proved, but it is well assigned without them.

Under the fourth cause for a new trial, the facts offered to be proved by the witness, M. F. Shuey, were as follows:

"That Mr. Danforth and Cole came to my office, where Danforth, in the presence of Cole, told me that they had settled all matters of difference between them, and the suit then pending in court; and that he, Danforth, had bought all of said Cole's interest in the hydraulic property, and they wished me to draw an assignment to Danforth in such a way that the same could not be construed to be a mortgage, but which should be an absolute conveyance for said property to Danforth, and at the same time give Mr. Cole one year to make sale of the property, as the agent of Danforth for one year; said Cole to have, as his commission, all he could make by such sale, over and above the amount paid by Danforth, and, in pursuance of such request, he drew said paper marked 'Exhibit A.'"

This "Exhibit A" is made a part of Proctor's answer, and was executed by the parties; the instrument itself, therefore, must be regarded as the agreement between the parties. We can see no purpose of the evidence offered, unless it was to show that the contract was a mortgage instead of a sale. For that purpose it was needless; for the instrument, upon its face, is a mortgage. It transfers certain personal property from Cole to Danforth, to be reconveyed by Danforth to Cole, upon payment by Cole to Danforth of a certain sum of money within one year from date. We think the evidence was properly rejected. If the evidence was offered to show that the instrument was an absolute sale, it was also properly rejected;—"once a mortgage always a mortgage." But we do not wish to be un-

derstood as deciding that parol evidence is competent, in any case, to show that a sale of personal property, absolute on its face, was intended by the parties to be a mere mortgage. This question, not being before us, is not decided.

The first, second and third causes for a new trial present no question to us, unless the evidence is in the record. The bill of exceptions begins by saying that "the following was all the evidence given in said cause, to wit:" Then follows several admitted facts. It then proceeds, with the following language: "It was admitted that a preponderance of the evidence showed that, on the 14th day of January, 1869, the plaintiff borrowed \$2,000 of one Calvin Danforth for one year, at 20 per cent. interest," etc.; and so continues, by stating a great number of facts, to the end. There is no testimony, paper or evidence of any kind stated in the bill, and nothing of substance except the few facts which are admitted. This does not fulfil the rule requiring all the evidence to be set forth in the bill of exceptions. Facts may be admitted in a bill of exceptions as facts, but when not so admitted, the evidence which tends to prove or disprove them must be set out; and, without the evidence before us, or some question of law occurring at the trial, it is difficult to see how the finding can be contrary to law. *Ward v. Bateman*, 34 Ind. 110; *Miles v. Buchanan*, 36 Ind. 490; *Miller v. Voss*, 40 Ind. 307; *Morrow v. The State*, 48 Ind. 432; *Railsback v. Greve*, 58 Ind. 72; *Robinson Machine Works v. Chandler*, 56 Ind. 575.

The questions of the sufficiency of the complaint, and of the second and third paragraphs of the answer, are yet to be noticed.

1. It is objected to the complaint that it does not aver a demand before suit; but it avers a conversion, and in pleading, when a conversion is averred, no demand need be averred, as at the trial, if a conversion be proved, no demand need be proved. *Cooper v. Helsabeck*, 5 Blackf. 14;

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Jones v. Gregg, 17 Ind. 84; *Boyle v. Guysinger*, 12 Ind. 273; *Robinson v. Skipworth*, 23 Ind. 311; *Nelson v. Corwin*, 59 Ind. 489.

2. The second objection taken to the complaint is that it does not show that the appellant wrongfully received or wrongfully retains the dividends sued for; but it shows that he wrongfully converted them to his own use, and this is sufficient. See the authorities, *supra*.

3. Third, that it does not "set out the dates and amounts of the dividends in itemized form, like an account." We do not perceive that this objection exists, but, if it did, it should have been corrected on motion to make it more certain; it can not be reached by a demurrer, for other facts are alleged in the complaint, which constitute a cause of action.

The complaint is clearly sufficient.

The second and third paragraphs of answer admit a portion of the facts charged in the complaint, and deny others; but such as are admitted are not avoided by any new matter. These paragraphs are indeed nothing more than argumentative denials, and contain no material fact that might not have been given in evidence at the trial under the general denial. It is clear that the appellant was not injured by the rulings of the court on the demurrers.

There is no available error in the record.

The judgment is affirmed, at the costs of the appellant.

Opinion filed at November Term, 1878.

Petition for a rehearing overruled at May Term, 1879.

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86	580
182	18

THE INDIANAPOLIS, PERU AND CHICAGO R. W. CO. v. HOOD ET AL.

CONVEYANCE.—Condition Subsequent.—Forfeiture.—Reversion.—Railroad.—

Where real estate is conveyed to a railroad company, "for and in consideration of the permanent location and construction of the depot of said

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railroad" thereon, and such depot is constructed upon said real estate, but is subsequently removed and erected upon other land, the removal constitutes a breach of the implied condition subsequent contained in such deed, and such real estate reverts to the grantor.

From the Miami Circuit Court.

D. Moss, for appellant.

H. J. Shirk and *J. Mitchell*, for appellees.

Howk, J.—In this action, the appellees sued the appellant, in a complaint of three paragraphs, to recover the possession of certain town lots, particularly described, in Hood's Addition to the town of Peru, in Miami county, Indiana, and to have their title quieted to said town lots.

To the appellees' complaint the appellant answered, in five paragraphs; and to the second and fifth paragraphs of answer, the appellees' demurrers, for the alleged want of facts therein, were sustained by the court, and to these rulings the appellant excepted. To the other affirmative paragraphs of answer, the appellees replied by a general denial thereof.

The issues joined were tried by the court, upon an agreed statement of facts, and a finding was made for the appellees; and the appellant's motion for a new trial having been overruled, and its exception saved to this decision, the court rendered judgment on its finding, for the appellees.

The appellant has assigned, in this court, the following decisions of the court below, as errors:

1. In sustaining the appellees' demurrer to the second paragraph of appellant's answer; and,
2. In overruling its motion for a new trial.

In his brief of this cause, in this court, the appellant's counsel has not discussed the question of the sufficiency of the second paragraph of the appellant's answer. Under the settled practice of this court, the first alleged error must therefore be regarded as waived.

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In its motion for a new trial, the causes therefor, assigned by the appellant, were that the finding of the court was not sustained by sufficient evidence, and that it was contrary to law. The only question for our decision, under the second alleged error, is whether or not the facts agreed to by the parties on the trial were sufficient in law to show that the appellees were the owners of the town lots described in their complaint, and entitled to the relief prayed for therein. As necessary to a proper understanding of the question presented, and of our decision thereof, we set out the agreed statement of facts, on which this cause was tried and decided in the circuit court, as follows:

“On the 17th day of November, 1851, Sophia C. Noel, being the owner in fee of lots Nos. 61, 63, 64, 65, 66, 67, 68, 69 and 70, in Hood's Addition to the town of Peru, conveyed the same by deed to the President and Directors of the Peru and Indianapolis Railroad Company, of which company the defendant herein is the successor and owner of all the rights, title and interest, which said company above named had in said lots, a copy of which deed is filed with the complaint. The only consideration for the conveyance of said lots is that mentioned in the deed. The said company, to which said lots were so conveyed, took immediate possession thereof and erected a frame building thereon, which said company used as their depot at Peru, Miami county, Indiana, until succeeded by the defendant; and the defendant continued to use the same as a depot, until about the 15th day of November, 1869, when the defendant ceased to use the same for that purpose, and has built and occupied a depot entirely off of said lots and about one-third of a mile distant therefrom; that Sophia C. Noel, on the — day of —, 1868, and before the commencement of this suit, died intestate, leaving the plaintiffs her only heirs at law, who inherited

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all the right, title and interest she had in said lots; and that they made a demand of the defendant of the possession of said lots, before the commencement of this suit."

This agreed statement of facts was signed by the attorneys of the respective parties, and, with the deed mentioned therein, constituted all the evidence given in the cause, as shown by the bill of exceptions. The deed referred to was dated on the 17th day of November, 1851, and was executed by said Sophia C. Noel and Smallwood Noel, her husband, to the President and Directors of the Peru and Indianapolis Railroad Company. This deed witnessed, "That the said party of the first part, for and in consideration of the permanent location and construction of the depot of said railroad at Peru, in the county of Miami, Indiana, on the lots hereinafter named, upon such or so many or such parts thereof as the said railroad company shall elect, have given, granted, conveyed, and by these presents do give, grant, convey and confirm, unto the said party of the second part, lots numbers sixty-one, sixty-three, sixty-four, sixty-five, sixty-six, sixty-seven, sixty-eight, sixty-nine and seventy, in the Hood Addition to the town of Peru, in the county of Miami aforesaid; which said several lots were the property of said Sophia C. Noel, and are now conveyed by the said party of the first part to the said parties of the second part, for a site for the depot of said railroad, at Peru aforesaid, together with all the privileges and appurtenances thereunto belonging; to have and to hold the premises aforesaid, with the appurtenances, to the said party of the second part, for the purposes aforesaid."

This deed was duly acknowledged by the grantors therein, and recorded in the recorder's office of said Miami county, on the 20th day of January, 1852.

It will be readily seen, we think, from the facts agreed

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upon in this case, and the phraseology and terms of the deed, the substance of which we have set out, that the proper decision of this action depends upon the construction to be given to the deed in question. If it can be correctly said, that the railroad company, of which the appellant was the lawful successor, took and held the said lots, under the terms of said deed, upon the condition subsequent, that the said company should permanently locate and construct its depot at Peru, upon the said lots, or some of them, or some part thereof, then it can not be doubted that there was a breach of such condition, under the facts agreed upon by the appellant, by its removal of its depot at Peru from off the said lots, and that, by reason of such breach of such condition, the appellant's title to said lots was defeated, and the ownership thereof reverted to the appellees, as the heirs at law of said Sophia C. Noel, the grantor in said deed.

It seems to us that, by the express terms of the deed of said Sophia C. Noel to the President and Directors of the Peru and Indianapolis Railroad Company, the said company did thereby take and accept the said lots therein described, upon the condition subsequent that it would permanently locate and construct its depot at Peru upon the said lots, or some of them, or some part thereof. This condition subsequent was, we think, clearly expressed in the deed under consideration, although the word "condition" was not used therein; and it is very evident that this condition subsequent was the only consideration or inducement for the execution of said deed by said Sophia C. Noel. The appellant's breach of this condition, by its removal of its depot at Peru from off the said lots, or any of them, or any part thereof, and by its location, construction and occupation of a depot at Peru, entirely off of the said lots, and about one-third of a mile distant therefrom, was expressly and fully admitted in the agreed statement

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of facts. We are clearly of the opinion that this breach of the condition subsequent in the said deed of Sophia C. Noel worked a forfeiture of the appellant's estate in said lots under said deed, and rendered them subject to be recovered back by the appellees, as the heirs at law of said Sophia C. Noel, either at law or in equity. *Cross v. Carson*, 8 Blackf. 138; *Leach v. Leach*, 4 Ind. 628; *Leach v. Leach*, 10 Ind. 271; *Scott v. Stipe*, 12 Ind. 74; and *Clark v. Holton*, 57 Ind. 564.

The court committed no error, in our opinion, in overruling the appellant's motion for a new trial of this cause.

The judgment is affirmed, at the appellant's costs.

SHILLING ET UX. v. TEMPLETON.

CONTRACT.—*Work and Labor.*—*Pleading.*—*Action.*—Where work has been done and materials furnished, under a special contract, and the work has been fully performed and the conditions of the contract fulfilled, an action will lie for such work and labor and materials upon the common counts, and upon the trial the plaintiff can prove the special contract and the performance under it.

SAME.—*Mechanic's Lien.*—*Married Woman.*—In a complaint to enforce a mechanic's lien against the property of a married woman, an allegation that "said improvements were necessary for the full and complete enjoyment of said real estate" sufficiently shows that they were for the "betterment" of her estate.

SAME.—*Act Repealed by Implication.*—When a married woman makes improvements upon her separate estate by building, it is not necessary that she should contract with a view of charging such estate, as it is the law and not the contract which gives the mechanic his lien. If there is any irreconcilable conflict between the proviso to section 5 of the act touching the marriage relation, 1 R. S. 1876, p. 550, and the law on the subject of mechanic's liens, the latter, being the later law, must prevail.

From the Boone Circuit Court.

P. H. Dutch and — *Mahan*, for appellants.

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145	317
66	585
158	484
66	585
163	531
163	534

Shilling et ux. v. Templeton.

WORDEN, C. J.—Complaint by the appellee, against the appellants, to enforce a mechanic's lien.

Joint demurrer, and a several demurrer by the appellant Nancy, to the complaint, for want of sufficient facts, overruled and exception.

Such proceedings were had as that judgment was rendered for the plaintiff, for the enforcement of the lien.

No question is properly presented but such as relates to the sufficiency of the complaint.

The complaint alleges that "the plaintiff entered into a special contract with the defendants for the furnishing of materials, and the labor and skill in and about the performance of the carpenter work, in the finishing of a certain brick building, situate in Thorntown, Boone county, Indiana, on the following described lot, to wit:" (description.) "Said described lot being the separate property of the defendant Nancy Shilling, wife of the defendant Thomas Shilling, for the sum of ——— dollars; that said improvements were necessary for the full and complete enjoyment of said real estate of the defendant Nancy Shilling; and that plaintiff did, under the contract above mentioned, fully perform all the conditions of said contract on his part, and did fully perform the carpenter work in and upon the finishing of said brick building situated on said lot so above described, to the amount of ——— hundred dollars, a bill of the particulars of which, together with notice of lien, is filed herewith," etc. It then proceeds to allege the filing of the notice of intention to hold a lien on the lot for the sum of one hundred and forty-seven dollars, accompanied by a bill of particulars, and that the claim was due and unpaid.

It is claimed that the joint demurrer should have been sustained, because the terms of the special contract mentioned are not set out. This objection is not well taken. Where work and labor has been done and materials fur-

nished, under a special contract, and the work has been entirely completed, an action will lie for it upon the common counts, without setting out the special contract. Here, it is alleged that the plaintiff fulfilled all the conditions of the contract and fully performed the work. He could therefore sue as upon the common counts for work and labor and materials furnished, and upon the trial prove the special contract and the performance under it. *Brown v. Perry*, 14 Ind. 32.

It is also urged that the separate demurrer of the appellant Nancy should have been sustained, because it was not alleged that the building was for the "betterment" of her estate. The allegation that "said improvements were necessary for the full and complete enjoyment of said real estate," we think, was sufficient. Married women should not be divested of all discretion in reference to the improvements they may desire to make upon their separate property.

Again, it is urged that her demurrer should have been sustained, because the complaint does not show that she "contracted with a view of charging her separate real estate."

It was not necessary that she should have contracted with such view. It is the law and not the contract that gives the mechanic his lien. As married women are entitled to hold separate property, they must be permitted to improve, in order that they may enjoy it. And when they make improvements by building, etc., the law steps in and gives the mechanic a lien on the property for his work or materials, upon his taking the proper steps to acquire the same; and this though the woman, by reason of her coverture, may not be personally bound therefor.

The law giving the mechanic his lien must be construed in connection with the proviso to the 5th section of the act touching the marriage relation, etc., 1 R. S. 1876, p.

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550, "That such wife shall have no power to incumber or convey such lands, except by deed, in which her husband shall join." This proviso, and the law on the subject of mechanics' liens, should be construed together, so as to permit both to stand if it can be reasonably done. But, if there is an irreconcilable conflict between them, the law on the subject of mechanics' liens is the later law and must prevail. See, on the subject of the proviso above quoted, the cases of *Behler v. Weyburn*, 59 Ind. 143, and *The American Insurance Co., etc., v. Avery*, 60 Ind. 566.

The judgment below is affirmed, with costs.

 KELLUM v. THE STATE.

CRIMINAL LAW.—*Sale of Lottery Ticket.*—*Vincennes University Lottery.*—*Corporation.*—*Contract.*—*Vested Right.*—*Constitutional Law.*—Upon a prosecution for the alleged unlawful sale of a ticket in a certain gift enterprise and lottery scheme, the following facts were admitted: That, by an act approved Sept. 17th, 1807, passed by the Indiana Territorial Legislature, "The Vincennes University" was instituted and incorporated within said territory, and certain named trustees and their successors created a body corporate and politic, with continuous succession; that, by section 15 of said act, to raise money for the purpose of procuring a library and the necessary philosophical and experimental apparatus for said University, not to exceed the lawful amount, a lottery was authorized and provision made for the manner in which it should be conducted; that, in 1879, pursuant to said section 15, a lottery scheme was organized, in the mode therein prescribed, and the ticket sold, for the sale of which said prosecution was instituted; that no other lottery had ever been held and no other attempt made to carry out the provisions of said section; and that no funds had ever been raised for the purpose therein named.

Held, that the prosecution can not be maintained.

Held, also, that, under the fundamental law for the government of Indiana Territory, the territorial legislature had power to incorporate said University with perpetual succession, and to endow it with the lottery privilege, for the purpose named.

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Held, also, that the grant of such lottery privilege has never been annulled or repealed and is still in force.

Held, also, that the institution incorporated was a private corporation, and when the board of trustees thereof accepted the terms of the act of incorporation, and the institution was organized thereunder, the lottery privilege became a matter of contract and vested right, which could not be abridged, impaired or annulled by any government thereafter organized within said territory.

From the Knox Circuit Court.

F. W. Viehe, R. G. Evans, A. L. Roache and E. H. Lamme, for appellant.

T. W. Woollen, Attorney General, and *J. S. Long*, Prosecuting Attorney, for the State.

Howk, J.—Upon affidavit and information filed in the court below, the appellant was prosecuted for the unlawful sale, as alleged, of one share and ticket in a certain gift enterprise and lottery scheme for the division of personal property and money, by chance and lot. The sufficiency of the affidavit and information was not questioned, in any manner, in the circuit court, nor is it in this court. Therefore, we need not state in this opinion the substance even of either the affidavit or information. We need only say, that the appellant was therein and thereby charged with the alleged unlawful sale, on the 10th day of May, 1879, at Knox county, Indiana, of such share or ticket, to a certain named person, for a certain sum of money.

The appellant appeared in person and by counsel, and filed a special plea or answer to the information, in which plea or answer, the appellant alleged, in substance, that the Legislature of the Indiana Territory, by an act approved on the 17th day of September, 1807, instituted and incorporated an University in said territory, called and known by the name of "The Vincennes University," and enacted that certain persons named in said act, and their successors, should be and thereby were created to be a body corporate and politic, by the name and style of the "Board

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of Trustees for the Vincennes University;" and the said Legislature, among other things, provided in said act that, for certain purposes therein named, there should be raised a sum not exceeding twenty thousand dollars by a lottery, and that the said Board of Trustees should appoint five discreet persons to be managers of said lottery, and who should have power to adopt such schemes as they might deem proper to sell lottery tickets for the purpose aforesaid, and to superintend the drawing of the same, and the payment of the prizes; that, in pursuance of the provisions of said act, the said Board of Trustees, for the purpose of raising the sum of twenty thousand dollars in said act mentioned, on the 1st day of May, 1879, appointed Hiram A. Foulks, Wilson J. Williams, George G. Reily, William B. Robinson and Charles W. Jones, five discreet persons, as such managers; that the said managers, having each qualified and given bond and security as required by said act and to the approval of said Board of Trustees, adopted the scheme alleged in the information, for raising the said sum of money, and, for that purpose, determined to conduct and manage a lottery, under the provisions of said act; and they appointed the appellant an agent for the sale of the tickets, and he sold one of them to the person named in the information, and the sale so made is the same sale alleged in the information, and the lottery so intended to be had is the first lottery under said act; that the said sale of said ticket was made for the purpose of aiding in procuring a library and the necessary philosophical and experimental apparatus, agreeably to the act aforesaid; and that no funds had been raised for said purpose, nor had the trustees of said University raised or received any funds for said purpose.

To this special plea or answer, the State, by its attorney, demurred upon the ground that it did not state facts sufficient to constitute a defence to the information, which de-

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murrer was sustained by the court, and to this decision the appellant excepted.

The appellant then interposed a plea of not guilty to the information, and, a jury having been waived, the cause was tried by the court; and a finding was made that the appellant was guilty, and assessing his fine in the sum of one dollar. The appellant's motion for a new trial having been overruled, and his exception entered to this ruling, the court rendered judgment upon its finding, and from this judgment this appeal is now here prosecuted.

In this court the appellant has assigned, as errors, the following decisions of the court below :

1. In sustaining the State's demurrer to his special plea; and,
2. In overruling his motion for a new trial.

In his motion for a new trial, the only causes therefor, assigned by the appellant, were, that the finding of the court was not sustained by sufficient evidence, and that it was contrary to law.

The two errors assigned by the appellant, on the record of this cause, may properly be considered together; for the questions for our decision are purely questions of law, and are presented by either or both of said errors, but more fully and clearly, perhaps, by the alleged error of the court, in overruling the motion for a new trial. A bill of exceptions, containing the evidence adduced upon the trial, is properly in the record. This evidence consisted chiefly of facts, the truth of which was admitted at the trial by the parties to the record. It is necessary, we think, to a proper understanding of the case, and of our decision of the questions arising therein, that we should give a summary, at least, of the admitted facts, as shown by the record, in this opinion.

By an act approved September 17th, 1807, it was enacted by the "Legislative Council and House of Representatives" of the Indiana Territory, "that an university be,

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and is hereby instituted and incorporated within this Territory, to be called and known by the name or style of 'The Vincennes University,' that William Henry Harrison, John Gibson, Thomas T. Davis, Henry Vanderburgh, Waller Taylor, Benjamin Parke, Peter Jones, James Johnson, John Baddollet, John Rice Jones, George Wallace, William Bullitt, Elias McNamee, Henry Hurst, Gen. W. Johnston, Francis Vigo, Jacob Kuykendoll, Samuel McKee, Nathaniel Ewing, George Leach, Luke Decker, Samuel Gwathmey, and John Johnson, are hereby declared to be trustees of the said university, that the said trustees and their successors, be, and they are hereby created a body corporate and politic, by the name of 'The Board of Trustees for the Vincennes University,' and are hereby ordained, constituted and declared to be forever hereafter, a body politic and corporate, in fact and in name, and by that name they and their successors, shall, and may have continual succession, and shall be persons in law," etc.

Section 15 of said act was as follows :

"And be it further enacted, That for the support of the aforesaid institution, and for the purpose of procuring a library, and the necessary philosophical and experimental apparatus, agreeably to the eighth section of this law, there shall be raised a sum not exceeding twenty thousand dollars by a lottery, to be carried into operation as speedily as may be, after the passage of this act, and that the trustees of the said university shall appoint five discreet persons, either of their body, or other persons, to be managers of the said lottery, each of whom shall give security to be approved by said trustees, in such sum as they shall direct, conditioned for the faithful discharge of the duty required of said managers ; and the said managers shall have power to adopt such schemes as they may deem proper, to sell the said tickets, and to superintend the drawing of the same, and the payment of the prizes ; and that as often as said managers shall receive one thousand dollars, they shall deposit the

same in the hands of the treasurer of the said board of trustees; and said managers and trustees, shall render an account of their proceedings therein at the next session of the Legislature, after the drawing of said lottery."

On the 1st day of May, 1879, the board of trustees for the Vincennes University appointed the persons named in the appellant's plea to the information, as five discreet persons to manage the lottery authorized by the act incorporating said University. Each of the said managers executed bond with security, as required by the 15th section of said act; and the said managers then adopted the scheme for a lottery mentioned in the appellant's special plea, and appointed the appellant an agent to sell tickets for such lottery. As such agent for the said managers of said lottery, the appellant sold the ticket in said lottery at the time, for the price, and to the person, mentioned in the information in this case. No drawing of prizes, nor lottery of any kind, had ever been held by or for said University, or by any one else, under the said law, or in any attempt to carry out its provisions. No funds had ever been raised or had by the said Board of Trustees, for the purposes named in the 15th section of the aforesaid act; nor did the said board have any funds with which to provide a library and the necessary philosophical and experimental apparatus for said University.

It seems to us that the question presented for our decision, by the appellant's special plea and by the evidence in the record, may be thus stated: Has the grant to the Board of Trustees for the Vincennes University, of the right and privilege to raise a fund of twenty thousand dollars by a lottery scheme, for the purpose of procuring a library and the necessary philosophical and experimental apparatus for said University, been in any manner abrogated, annulled or repealed since the passage of the said

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act by the Territorial Legislature, under which the University was and is incorporated?

At the time of the passage of said act, the fundamental law for the government of the Indiana Territory was the ordinance of Congress of 1787, "for the government of the territory of the United States north-west of the river Ohio," and the act of Congress, approved May 7th, 1800, providing for the organization of the Indiana Territory as a separate government. It can not be doubted, we think, that, under this fundamental law, the Legislative Council and House of Representatives of the Indiana Territory had full and ample power to incorporate the Vincennes University with perpetual succession, and to endow it with the power and privilege of raising a fund, of a certain specified amount, by a lottery scheme, for the purpose of procuring a library and the necessary philosophical and experimental apparatus for said University. The institution to be incorporated was, in every sense, a private corporation; and, therefore, when the Board of Trustees for the Vincennes University accepted the terms of the act of incorporation, and the institution was organized thereunder, the franchises and privileges, including the lottery privilege, with which the University was endowed by the law-making power of the Indiana Territory, became and were matters of contract and vested rights, which could not be abridged, impaired, or annulled by any subsequent government thereafter organized within said Territory.

When the Indiana Territory was first organized as a State, it was declared in section 1 of article 12 of the Constitution of 1816, "that all rights, * * * contracts, and claims, both as it respects individuals and bodies corporate, shall continue as if no change had taken place in this government." Under this provision it is very clear, we think, that the rights and privileges of the University, under the territorial law by which it was incorporated, were continued in full force, unabridged and unimpaired, as

they existed prior to the organization of the State government. The constitution of 1816 contained no prohibition against the establishment of lotteries by legislative action, but was entirely silent on that subject.

By "An act concerning lotteries," approved February 3d, 1832, it was enacted by the General Assembly of this State, "That hereafter if any person or persons shall sell any lottery tickets, or share in any lottery, or scheme for a division of property, to be determined by chance, or shall make or draw any lottery, or scheme for a division of property as aforesaid, not authorized by law, on conviction thereof, upon presentment or indictment, [he or they?] shall be fined in any sum not exceeding five hundred dollars for each offence, at the discretion of the jury: *Provided*, that nothing in this act shall be so construed, as to affect any person selling any lottery tickets, or drawing any lottery, which shall have been made, and shall not be drawn at the taking effect of this act."

So far as we are advised, this act was the first legislation in this State which made the sale of lottery tickets an offence punishable by fine. This act was embodied, without alteration or amendment, in the Revised Statutes of 1838, p. 223. It will be observed, that this act expressly recognized the fact, that there were or might be lotteries "authorized by law," and the sale of tickets in such lotteries was not made an offence, and clearly was not within the purview of the act.

In the Revised Statutes of 1843, p. 982, the act of February 3d, 1832, was incorporated, with the omission only of the proviso in the act, as section 104, in chapter 53 of that revision, and, in the same manner and language, it was incorporated in the act defining misdemeanors, and prescribing punishment therefor, approved June 14th, 1852, as section 32 of said act. 2 R. S. 1852, p. 437.

By an act approved February 23d, 1859, this section 32 of the misdemeanor act was amended, and the section

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as then amended is the law now in force on the subject of lotteries, and under which the appellant is prosecuted in this case. Acts 1859, p. 128; 2 R. S. 1876, p. 470.

By reference to this amended section 32 now in force, it will be seen that in it, as in the original act of February 23d, 1832, *supra*, the law is expressly limited to lotteries "not authorized by law." The necessary implication from this limitation is, that there were or might be lotteries authorized by law; and, in that event, it is clear that the sale of tickets in such lotteries would not come within the purview of said section 32, would not be a violation of the provisions of said section, and of course would not subject the person or persons making such sale to punishment thereunder.

Section 8 of article 15 of the constitution of this State, adopted in 1851, reads as follows:

"SEC. 8. No lottery shall be authorized; nor shall the sale of lottery tickets be allowed."

It is very clear, from the language of this section, that it has reference solely to what shall not be authorized and shall not be allowed, in the time future or subsequent to the time of the adoption of that section as a part of the fundamental law of this State. After the 1st day of November, 1851, the General Assembly of this State could not, under the constitution which took effect on that day, authorize or establish any lottery. But it is certain, we think, that neither the constitution of 1851, nor any law enacted thereunder or pursuant thereto, did or could in any manner abridge, impair or annul the lottery right, franchise or privilege with which the Board of Trustees for the Vincennes University was endowed by the territorial law for the incorporation of said University. This lottery franchise was and is a vested right and a matter of contract, which could not and can not be impaired, under the constitution of the United States, by either the State constitution or State laws. This is settled law, so long and so

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well established that it hardly needs the citation of authorities in its support. In the case of *The Board of Trustees for the Vincennes University v. The State of Indiana*, 14 How. 268, the territorial act of 1807, under which the complainants in that case were incorporated, was considered to some extent by the Supreme Court of the United States, and, in delivering the opinion of the court, Mr. Justice McLEAN said :

“The complainants, by accepting and exercising their corporate powers, acquired certain rights, and made certain contracts, which could not be impaired by the Legislature. They constituted an eleemosynary corporation, in which the State has no property, and can exercise no power to defeat the trust.”

See, also, on the subject under consideration, the case of *Dartmouth College v. Woodward*, 4 Wheat. 518; *Cooley* Const. Lim 279; *The Binghampton Bridge*, 3 Wal. 51; *Payne v. Baldwin*, 3 Sm. & M. 661; *Michigan State Bank v. Hastings*, 1 Doug. Mich. 225; and *Edwards v. Jagers*, 19 Ind. 407.

In conclusion, we hold that the lottery established by the Board of Trustees for the Vincennes University, under the 15th section of the territorial law for the incorporation of said University, as alleged in the information in this case, was and is a lottery “authorized by law;” and that, for this reason, the appellant, in the sale of the ticket or share in said lottery, as alleged and admitted, was not guilty of any violation of said section 32 of the misdemeanor act, or of any offence under the laws of this State. It seems to us that the court erred, both in sustaining the demurrer to the appellant’s special plea and in overruling his motion for a new trial.

The judgment is reversed, and the cause is remanded, with instructions to overrule the demurrer to the special plea, and for further proceedings in accordance with this opinion.

Schoonover v. Reed.

SCHOONOVER v. REED.

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MALICIOUS PROSECUTION.—*Complaint.*—A complaint for damages for malicious prosecution, which fully alleges the institution of a criminal prosecution of the plaintiff by the defendant, acquittal thereof, malice, want of probable cause and damage, is sufficient.

SAME.—*Pecuniary Damages.*—*Motion to make Certain.*—*Demurrer.*—The failure of the complaint in such case to state the particular amount of expense to which the plaintiff alleges he was subjected in resisting the criminal prosecution may be reached by a motion to make certain, but not by demurrer.

BILL OF EXCEPTIONS.—*Time of Filing.*—*Record.*—Where time beyond the term is not granted for the filing of a bill of exceptions, it forms no part of the record if filed after the term.

From the Warren Circuit Court.

J. A. Stein, G. O. Behm, J. Park and A. O. Behm, for appellant.

J. McCabe, for appellee.

PERKINS, J.—Suit for malicious prosecution. The complaint is in two paragraphs. The first reads as follows:

“W. H. H. Reed complains of James Schoonover, and says that said defendant, maliciously and without probable cause, instituted a criminal prosecution against the plaintiff herein, jointly with others, charging them with having, on or about the 10th day of September, 1873, committed a malicious trespass, by then and there tearing down a house, the property of said Schoonover, and hauling it away, maliciously and mischievously, at said county; that said charge was preferred, and prosecution instituted, before George G. Pierson, a justice of the peace of said county; that said justice issued a warrant upon said charge, by virtue of which said plaintiff was arrested, and brought before said justice, tried, acquitted and discharged, and said prosecution against him is ended; by which prosecution the plaintiff was greatly damaged in his good name, and greatly scandalized among his neighbors, and suffered great mortification and agony of mind, and was put to great trouble and expense in and about his defence,

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hindered and prevented from attending to his daily affairs; to his damage one thousand dollars, for which he demands judgment, with costs, and all other proper relief," etc.

The second paragraph was similar to the first. The paragraph alleged pecuniary, among other, damages, but did not specify the amount. No motion to make the complaint more certain was interposed.

The paragraphs of complaint were severally demurred to for want of facts, but the demurrers were overruled, and exceptions entered.

Answer in general denial.

Trial by a jury; verdict for plaintiff, for five hundred dollars; motion for a new trial overruled; the plaintiff remitted two of the five hundred dollars, and judgment for three hundred dollars was entered for the plaintiff.

This was on the fifteenth day of the November term, 1873. No leave was entered of record to file a bill of exceptions after the expiration of the term, and no bill was filed till the 2d day of February, 1874.

This is the assignment of errors:

1. The court erred in overruling the demurrers to the paragraphs of the complaint;
2. The court erred in overruling the motion for a new trial;
3. The court erred in rendering judgment for the plaintiff.

The court did not err in overruling the demurrers to the paragraphs of complaint. The paragraphs alleged sufficient facts. *Stancliff v. Palmeto*, 18 Ind. 321; *Ruston v. Biddle*, 43 Ind. 515; *McCullough v. Rice*, 59 Ind. 580; *Carey v. Sheets*, 60 Ind. 17.

They contain, severally, the four averments of prosecution instituted, and ended by the discharge of the defendant therein, malice, want of probable cause, and damage.

As to the second and third assignments of error, in the

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absence of a bill of exceptions presenting either erroneous rulings on the trial, or the evidence in the cause, they raise no question for decision by this court.

The judgment is affirmed, with costs.

THE CITY OF HUNTINGTON v. THE STATE, EX REL. STEELE.

From the Huntington Circuit Court.

B. F. Ibach and B. M. Cobb, for appellant.

L. M. Ninde, A. Zollars, F. T. Zollars and T. G. Smith, for appellee.

Howk, C. J.—The questions presented for decision by the record of this cause, and by the appellant's assignment of errors thereon, are substantially the same as those which were fully considered and decided by this court, in the case of *Stultz v. The State, ex rel.*, 65 Ind. 492. For the reasons there given, and for similar error, this cause must be decided as that was decided.

The judgment is reversed, and the cause is remanded, with instructions to sustain the appellant's demurrer to the appellee's information.

Opinion filed at November Term, 1878.

THE MISSISSIPPI VALLEY INSURANCE CO. v. HUMPHREY ET AL.

From the Posey Circuit Court.

C. Denby and D. B. Kumler, for appellant.

A. Iglehart, J. E. Iglehart, A. Gilchrist and C. H. Butterfield, for appellees.

BIDDLE, J.—It is admitted by the parties that this case is the same, in all respects, as the case of *The Franklin Insurance Company of Indianapolis v. Humphrey*, ante, p. 549, decided at the present term, except in the name of the appellant. Upon the authority of that case, therefore, the judgment in this case is affirmed, at the costs of the appellant.

FABER v. THE STATE.

From the Kosciusko Circuit Court.

J. S. Frazer, W. D. Frazer, L. H. Haymond and — *Royse*, for appellant.

T. W. Woollen, Attorney General, for the State.

PERKINS, J.—The judgment in this case is affirmed, upon the authority of *Manheim v. The State*, ante, p. 65, at this term, in which case the question presented in this is decided. Affirmed, with costs.

Petition for a rehearing overruled.

FABER v. THE STATE.

From the Kosciusko Circuit Court.

J. S. Frazer, W. D. Frazer, L. H. Haymond and — *Royse*, for appellant.

T. W. Woollen, Attorney General, for the State.

PERKINS, J.—The judgment in this case is affirmed, upon the authority of *Manheim v. The State*, ante, p. 65, at this term, in which case the question presented in this is decided. Affirmed, with costs.

Petition for a rehearing overruled.

Baum v. The State.

FABER v. THE STATE.

From the Kosciusko Circuit Court.

J. S. Frazer, W.D. Frazer, L. H. Haymond and — *Royse*, for appellant.
T. W. Woollen, Attorney General, for the State.

PERKINS, J.—The judgment in this case is affirmed, upon the authority of *Manheim v. The State*, ante, p. 65, at this term, in which case the question presented in this is decided. Affirmed, with costs.
 Petition for a rehearing overruled.

PATTISON v. DOLLMAN.

From the Marion Superior Court.

F. H. Levering, C. Ballenger and *D. M. Bradbury*, for appellant.
G. Carter and *J. N. Binford*, for appellee.

PERKINS, J.—Suit by appellee, against appellant and others, to enforce a mechanic's lien. The suit was in the Marion Superior Court, in which court, in special term, the appellee recovered judgment, upon a special finding. On appeal to general term, the following errors were assigned:

1. The court erred in its conclusions of law;
2. The court erred in sustaining the mechanic's lien.

The opinion upon the decision of the cause was given by Judge Williams in these words, viz.:

"This case is identical, in every particular except the name of the defendant and the amount of the lien claimed and proved, with appeal number ninety six, decided at the present term [*Harrington v. Dollman*, 64 Ind. 255, decided on appeal to this court, at this term]. Defendant, William A. Pattison, the present owner of the premises, alone appeals. The judgment in special term is affirmed."

An examination of the record of the two cases shows the accuracy of the above statement.

On appeal to this court, the error assigned was that the Superior Court, in general term, erred in affirming the judgment rendered in special term. The decision of this court in *Harrington v. Dollman*, supra, at the present term, decides that said assignment of error is not true.

The judgment is affirmed, with costs.

BAUM v. THE STATE.

From the Clinton Circuit Court.

A. E. Paige, S. O. Bayless and *J. U. Gorman*, for appellant.
T. W. Woollen, Attorney General, and *W. B. Moore*, Prosecuting Attorney, for the State.

HOWK, J.—This case is substantially the same, in all respects, as the case of *Perkins v. The State*, 65 Ind. 817. The appellant, Baum, and Perkins were jointly indicted for the same offence, growing out of the same transaction. Upon separate trials, they were severally convicted upon substantially the same evidence, and each of them appealed to this court. Manifestly, therefore, this cause must be decided as the case cited was decided, and for the same reasons.

The judgment is reversed, and the cause is remanded for a new trial; and the clerk of this court will issue notice, to the warden of the proper prison, to return the appellant, Baum, into the custody of the sheriff of Clinton county, to abide the further order of the Clinton Circuit Court.

Knowlton *et al.* v. The Citizens Building, Loan and Savings Association.

ELLIOTT v. BRUNER ET AL.

From the Marion Circuit Court.

J. S. Harvey, for appellant.

A. C. Ayres and *E. A. Brown*, for appellees.

NIBLACK, J.—This action was based upon certain proceedings, had before the common council of the City of Indianapolis, for the construction of a sewer in and along Missouri Street, from the north side of Market street to Kentucky Avenue.

Augustus Bruner and Russell M. River, the plaintiffs below, became the contractors for the construction of such sewer, and a portion of the cost of its construction was assessed against a contiguous lot of ground, fronting on Missouri Street and belonging to Calvin A. Elliott, the defendant.

There was a judgment in favor of the plaintiffs, in the circuit court, and the amount of the judgment was decreed to be a lien on the defendant's said lot.

It is agreed, between the parties, that the questions presented in this case are substantially the same as those involved in the case of *McGill v. Bruner*, 65 Ind. 421, decided at the present term of this court, and that the decision in that case shall be decisive of this.

Upon the authority of that case, the judgment in this case is affirmed, at the costs of the appellant.

LIMING v. NESBITT ET AL

From the Franklin Circuit Court.

W. H. Jones and *J. R. McMahan*, for appellant.

J. F. McKee and *D. W. McKee*, for appellees.

PERKINS, J.—This is a motion by the appellees, to dismiss the appeal and strike the cause from the docket. The judgment appealed from was rendered in March, 1877.

The appeal was taken and filed March 14th, 1878. Errors were assigned at the May term, 1878. The motion to dismiss was made on the 27th of November, 1878, and was supported by the affidavit of appellees, that Thomas E. Liming, whose name appears as the appellant, departed this life on the 18th day of August, 1877, seven months before the appeal was taken. The name of no executor or administrator has been substituted, if such substitution could be made. The death of Liming, as alleged in the affidavit of Nesbitt, is not controverted. Upon the authority of the case of *Taylor v. Elliott*, 53 Ind. 441, the motion to strike from the docket must be sustained. The appeal should have been taken under section 552, 2 R. S. 1876, p. 240. This section contains a misprint of *no* for *an*.

Motion sustained.

KNOWLTON ET AL. v. THE CITIZENS BUILDING, LOAN AND SAVINGS ASSOCIATION.

From the Cass Circuit Court.

F. Swigart, for appellants.

M. Winfield, for appellee.

PERKINS, J.—This suit was brought upon a written instrument as follows: " \$500.00. LOGANSFORT, IND., August 13th, 1872.

"For value received, we promise to pay to the Citizens Building, Loan and Savings Association, of Logansport, Ind., the sum of five hundred dollars, with interest at ten per cent. per annum, payable monthly.

Spencer *et al.* v. Raub *et al.*

"This obligation is given for money loaned under the constitution, by-laws and regulations of said association; and in case the said monthly interest, dues and fines or assessments, or any part thereof, shall remain unpaid for three months after the same become due, then, and in such case, this obligation shall become due and collectible; but in case said interest and dues, fines or assessments shall have been paid as aforesaid, then the principal of this obligation shall become due when the value of the assets of said association shall be sufficient to divide to each share of said stock the sum of five hundred dollars, or its equivalent, and the said principal shall then be paid by applying a sufficient amount of the stock owned by the undersigned to the payment of said principal, and thereupon the undersigned shall cease to have any interest in said stock so applied, and the same shall be cancelled.

"This obligation is given upon the further condition, that if at any time the directors shall deem the security unsafe or insufficient, they may require additional security, and if not given within the time granted, the whole amount of said principal and interest shall become due. And, in case this note is not promptly paid at maturity, we hereby agree and promise to pay the holder hereof the sum of ten per cent. thereon, for attorney's fees and expenses of collection. All to be paid without any relief whatever from valuation or appraisement laws. This note is not transferable."

The appellee obtained judgment on this instrument. This suit was by the same plaintiff that brought the suit and obtained the judgment in *McLaughlin v. The Citizens Building, etc., Association*, 62 Ind. 264, upon an exactly similar instrument. The decision in that case establishes the correctness of the judgment in this.

The judgment is affirmed, with costs.

SPENCER ET AL. v. RAUB ET AL.

From the White Circuit Court.

J. H. Matlock, for appellants.

PERKINS, J.—Petition for a highway. Viewers were appointed, who, after examining the proposed route, "marked and laid out a highway upon the same, forty feet wide, and found that it would be of public utility."

A remonstrance, and the appointment of reviewers, followed. The reviewers reported against the public utility of the road and that it would occasion damages, severally, to those through whose lands it was located. The report of the reviewers was approved, and the petition for the road dismissed, by the board of county commissioners. Appeal to the circuit court. Trial by jury; verdict that the road would be of public utility, and would damage no one. Motion for a new trial denied, and the road established, as laid out by the viewers.

Appeal to this court.

The appellees file no brief. Counsel for appellants, in his brief, says:

"The appellants moved the court, on general grounds, for a new trial, but the only one insisted upon is that the verdict was not sustained by sufficient evidence."

The jury and the court below were of opinion that it was, and, under a firmly established rule of this court, we can not disturb the action of the circuit court. The evidence was somewhat conflicting.

Affirmed, with costs.

Welshbillig *et al.* v. Dienhart.

SQUIER v. THE STATE.

From the Steuben Circuit Court.

J. K. Morrow, for appellant.

T. W. Woollen, Attorney General, and *G. B. Adams*, Prosecuting Attorney, for the State.

Howe, J.—The indictment in this case charged, that the appellant, on the 1st day of February, 1879, at Steuben county, Indiana, unlawfully suffered one Samuel Weicht, who was then and there a person under the age of twenty-one years to play a game of billiards with Freeborn Patterson, at and upon a billiard table, of which the appellant then and there had the care, management and control, contrary to the form of the statute, etc.

Upon a plea of not guilty, and a trial by the court, the appellant was found guilty as charged in the indictment; and his motion for a new trial having been overruled, and his exception entered to this ruling, judgment was rendered against him upon the finding, for the fine assessed by the court.

In this court, the appellant has assigned, as error, the overruling of his motion for a new trial. The causes assigned for such new trial, in the motion therefor, were that the finding of the court was not sustained by sufficient evidence, and was contrary to law. It seems to us that the error complained of is well assigned. The evidence in the record does not sustain the finding of the court. This evidence does not show that the appellant suffered the minor to play a game of billiards. In respect to the character or kind of game played, the evidence is substantially the same as that in the case of *Squier v. The State*, ante, p. 317, decided at this term, in which it was held that a game of fifteen-ball pool is not a game of billiards. See, also, the case of *Bar tender v. The State*, 51 Ind. 73.

The court erred, we think, in overruling the appellant's motion for a new trial.

The judgment is reversed, and the cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

WELSHBILLIG ET AL. v. DIENHART.

From the Tippecanoe Circuit Court.

G. S. Orth and *J. Park*, for appellants.

J. M. LaRue and *F. B. Everett*, for appellee.

Howe, J.—This was a suit by the appellee against the appellants, upon the same written contract, for the collection of rent, in which the same defences were made, and the same rulings of the court below are complained of, as errors, as those which were fully considered and passed upon by this court, in the recent case, between the same parties, of *Welshbillig v. Dienhart*, 65 Ind. 94. This cause must be decided, as the case cited was decided, for the reasons given in the opinion in that case.

The judgment is affirmed, at the appellants' costs.

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Held, on demurrer, there being no motion to make more certain, that the first and third paragraphs were sufficient.
Held, also, the finding of the court having been on the first and third paragraphs, that the overruling of a demurrer to the second was harmless.
Held, also, on demurrer for defect of parties, that the action was properly brought in the name of the State, for the use of such city.
Hadley v. State, ex rel., 271
2. *Same.—Interest paid Trustee by County Treasurer.*—The court trying such cause found specially, that the interest received by the defendant was interest accrued upon warrants issued by the county auditor, in favor of the defendant, on the county treasurer, for the funds themselves, and paid by the latter out of those funds.
Held, that the defendant was liable, that he is estopped to deny the authority

of the county treasurer to pay him such interest, and that the case does not fall within *Rock v. Stinger*, 36 Ind. 346. 16.

CONDITIONAL SALE.

See PROMISSORY NOTE, 17.

CONDITION SUBSEQUENT.

See CONVEYANCE.

CONSTITUTIONAL LAW.

See BOUNTY, 1; CITIES AND TOWNS, 1; CRIMINAL LAW, 1, 8, 19 to 23, 44; SHERIFF'S SALE, 9.

CONTINUANCE.

See BASTARDY, 2 to 5; CRIMINAL LAW, 32.

Absent Witness.—Affidavit.—Diligence.—An affidavit for a continuance on account of the absence of a witness alleged the issuance of a subpoena for the witness, and the return of "not found," on the day the cause was set for trial, and that the witness was temporarily residing at a place named, within the State.

Held, that there had not been due diligence in attempting to procure the attendance or deposition of the witness. *Leary v. Nave*, 220

CONTRACT.

See BASTARDY, 6; CITIES AND TOWNS, 1, 8, 5, 6; CRIMINAL LAW, 44; EVIDENCE, 2; MECHANICS' LIEN; PLEADING, 3; PROMISSORY NOTE, 15, 19, 20; SHERIFF'S SALE, 2, 8, 9; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS; TURNPIKE, 8.

1. *Sale.—Bailment.—Transfer of Goods, on Promise to Marry.—Breach of Promise, and Death of Promisor.—Action for Value of the Goods.—Verdict.—Answers to Interrogatories.—Complaint.—Demand.—Rescission. Fraud.*—In an action against a decedent's estate, wherein one paragraph of the complaint counted upon a promissory note executed to the plaintiff by the deceased, another was in the nature of a *quantum valebat* for goods sold and delivered to the deceased by the plaintiff, and a third was based upon contract and counted upon bailment of the same goods to the deceased by the plaintiff, to be returned on demand, the jury, with their general verdict for the plaintiff, found specially, in answer to interrogatories, that the deceased, intending to cheat and defraud the plaintiff, and intending not to keep his promise, had obtained from the plaintiff the transfer of the goods in question by promising to marry the plaintiff; that the goods had been transferred "upon contract of sale thereof to" the deceased by the plaintiff, and "upon an agreement by him to return the same to her on demand;" that the goods were then of the value alleged in the complaint; that the deceased had married another woman, and had failed either to return the goods or to pay therefor; and that an unsuccessful demand had been made upon both the deceased and his executor.

Held, that the defendant was not entitled to judgment on the answers, notwithstanding the verdict.

Held, also, that the answers are inconsistent with the paragraph counting on bailment, but are consistent with the *quantum valebat* count, and, therefore, that the verdict was founded upon the counts upon the *quantum valebat* and the note.

Held, also, that the answers show a contract of sale of the goods (reserving to the plaintiff the right to rescind on demand), upon an agreement to marry, fraudulently made by the deceased with intent to cheat the plaintiff out of the goods.

Held, also, that, upon breach of the marriage promise, the deceased in his lifetime, and his estate on his death, became liable for the value of the goods. *Frazer v. Ross*, 1

2. *Same.—Promissory Note prima facie Evidence of Settlement.—Instruction.*—There being evidence tending to disprove a settlement between the

- plaintiff and deceased embracing the goods in question, it was proper to instruct the jury that, while the execution of the note was *prima facie* evidence of settlement, they should look to all the evidence to determine whether there had been a settlement. *Ib.*
3. *Same.—Interest.—When it Commences.—Demand.*—The plaintiff was entitled to interest on the value of the goods sold, not from date of sale, but from the date of plaintiff's demand, made after breach of the marriage promise. *Ib.*
4. *Work and Labor.—Pleading.—Action.*—Where work has been done and materials furnished, under a special contract, and the work has been fully performed and the conditions of the contract fulfilled, an action will lie for such work and labor and materials upon the common counts, and upon the trial the plaintiff can prove the special contract and the performance under it. *Shilling v. Templeton*, 585

CONTRIBUTION.

See PROMISSORY NOTE, 5.

CONVERSION.

See EVIDENCE, 4.

Demand.—Motion to make Certain.—Demurrer.—When a conversion is alleged in a pleading, no demand need be averred; and, if the complaint shows that the defendant wrongfully converted the property to his own use, it is sufficient without showing that he wrongfully received or wrongfully retains such property; and, if such complaint fails to give a sufficient bill of particulars, the defect can be reached, not by demurrer, but by motion to make more certain. *Proctor v. Cole*, 576

CONVEYANCE.

See FRAUDULENT CONVEYANCE; MINES AND MINING; SPECIFIC PERFORMANCE; TURNPIKE, 6.

Condition Subsequent.—Forfeiture.—Reversion.—Where real estate is conveyed to a railroad company, "for and in consideration of the permanent location and construction of the depot of said railroad" thereon, and such depot is constructed upon said real estate, but is subsequently removed and erected upon other land, the removal constitutes a breach of the implied condition subsequent contained in such deed, and such real estate reverts to the grantor. *L. P. & C. R. W. Co. v. Hood*, 580

COPY.

See CHATTEL MORTGAGE, 2; CITIES AND TOWNS, 3; NEGLIGENCE, 14; PLEADING, 2, 3; PROMISSORY NOTE, 14.

CORPORATION.

See CRIMINAL LAW, 44.

COUNTER-CLAIM.

See PROMISSORY NOTE, 15.

COUNTY.

See BOUNTY; FEES AND SALARIES.

1. *Loan Authorized by County Commissioners.—Injunction to Prevent Payment of.—Notice that Loan is Illegal.*—Though the indebtedness of a certain county, evidenced by county bonds and orders, was in excess of one per centum of the assessed value of the taxable property of the county, the board of county commissioners authorized the auditor and treasurer of the county to borrow such sums of money, from time to time, as might be necessary to meet the liabilities of the county, and directing the auditor to issue county orders therefor, not exceeding however a specified sum. Similar orders were made by the board, and loans thereunder obtained, from time to time, until the aggregate indebtedness of the county exceeded two per centum of the assessed value of the taxable property of the county. A tax-payer then brought suit against the county commissioners, both as a board and personally, the au-

ditor, treasurer and the creditor, to enjoin the payment of the additional indebtedness so created, the complaint alleging, in addition to the foregoing facts, that the creditor, at the time such additional indebtedness was created, had full knowledge of the prior indebtedness of the county, and of the tenor of the orders authorizing the additional indebtedness.

Held, on demurrer, that section 17, 1 R. S. 1876, p. 166, prohibiting county commissioners from contracting additional indebtedness while a former loan thereunder exceeding one per centum of the assessed value of the taxable property of the county remains unpaid, does not prohibit temporary loans, and that the complaint is insufficient.

Held, also, that, in contracting such indebtedness, the board could act by its authorized agents. *Miller v. Board of Comm'rs, etc.*, 162

2. *Liability to Sheriff for Articles purchased for Jail.*—A county in this State is liable to the sheriff of such county, for the price of brooms and mops purchased by him and used in keeping the county-jail clean.

Board of Comm'rs, etc., v. Reissner, 568

COUNTY AUDITOR.

See COUNTY, 1.

1. *Official Bond.—Penalty Greater than required by Statute.*—Where the bond of a county auditor is executed in a greater sum than is required by section 2, 1 R. S. 1876, p. 154, it is not void, but the principal and surety are only liable as upon such a bond as the statute requires, and are bound for no greater sum than that required by the statute, as the penalty of such bond. *Graham v. State, ex rel.*, 386
2. *County Treasurer.—Credit for Moneys Paid on Unlawful Orders.*—When orders have been issued by the county auditor, and redeemed by the treasurer, he is entitled to a credit against the county for the amount thereof, although the act of the auditor, in issuing them, was unauthorized and unlawful; for it is the duty of the treasurer to pay the same, out of the proper fund. *Id.*
3. *Same.—Suit on Auditor's Bond.—Relator.—Estoppel.—Ratification.—Repeal by Implication.*—In a suit, in such case, upon the auditor's bond, the board of commissioners is the proper relator, and is not estopped or prejudiced by having, in settlement with the treasurer, allowed him the amount of the orders in question, as such allowance and settlement are no ratification of the acts of the auditor in issuing the orders and drawing the money upon them. With respect to the proper relator in such suits, section 12 of the act of May 31st, 1852, 1 R. S. 1876, p. 155, is impliedly repealed by section 7 of the code, 2 R. S. 1876, p. 86, which was approved June 18th, 1852, in so far as the latter conflicts with the former. *Id.*

COUNTY CLERK.

See FEES AND SALARIES.

COUNTY COMMISSIONERS.

See BOUNTY; COUNTY; COUNTY AUDITOR, 3.

COUNTY ORDERS.

See COUNTY AUDITOR.

COUNTY TREASURER.

See COUNTY, 1; COUNTY AUDITOR.

COVENANT.

See TURNPIKE, 6.

Breach of Warranty as a Defence to a Foreclosure.—Res Adjudicata.—Evidence.—Former Adjudication.—In an action for the collection of a promissory note, and for the foreclosure of a mortgage given to secure payment thereof, wherein the defendant answered that the note and mortgage were given solely for the purchase-money for the mortgaged premises, which had been conveyed by the plaintiff to the defendant by warranty

deed, and that there had been a breach of the covenants of such deed by reason of the fact that the defendant had been kept out of possession by a tenant holding under the plaintiff, and had expended money in ejecting the tenant, the plaintiff replied that the matters alleged in the answer had been adjudicated upon in a former action by the mortgagor, against the mortgagee, on the covenants of warranty, for breach thereof. The plaintiff, on the trial, offered in evidence a transcript of the pleadings, proceedings and judgment in an action by the mortgagor, against the mortgagee, for a breach of the covenants of such deed.

Held, that the evidence offered was competent.

Held, also, that the breach alleged in the answer was fairly presented by the issues made in the former action, and therefore must be deemed to be "at rest forever." *Turner v. Allen*, 252

CRIMINAL COURT.

See CRIMINAL LAW, 8; SURETY OF PEACE.

CRIMINAL LAW.

See HABEAS CORPUS; LIQUOR LAW; SLANDER.

1. *Billiards.—Suffering Minors to Congregate.—Constitutional Law.—Public Place.*—An indictment charged that, on, etc., at, etc., the defendant, "having the care, management and control of certain billiard tables, then and there kept in a public billiard hall, did then and there unlawfully suffer and permit" certain minors named "to then and there unlawfully congregate at, in and about said public billiard hall, wherein the said billiard tables were so kept," etc.

Held, that the indictment is sufficient.

Held, also, that the subject-matter of section 2 of the act of March 12th, 1873, 2 R. S. 1876, p. 484, is properly embraced in the title of the act.

Held, also, that the words "public billiard hall," used in the indictment, indicate a public place where billiard tables were kept to be used in playing billiards. *Manheim v. State*, 65

2. *Competency of Juror.—Opinion formed from Newspaper Report.*—On the examination of jurors empanelled to try the defendant in a criminal prosecution, a juror answered that, from the evidence given on a former trial of the same prosecution, as reported in a newspaper and read by him, he had formed and expressed an opinion on the merits of the case, to change which would require some evidence, but which would readily yield thereto.

Held, that the juror was competent.

Guettig v. State, 94

3. *Insanity.—Hypothetical Question.—Expert.*—A hypothetical question, put to a medical expert to obtain his opinion as to the sanity of a defendant, must be based upon facts admitted, proved or assumed, but need not be based on all of such facts. *Id.*

4. *Relative Strength of Presumptions of Sanity and Innocence.*—An instruction stating that "the presumption of innocence is so far of greater strength than" the presumption "of sanity, that, when evidence appears tending to prove insanity, it compels the prosecution to establish, from all the evidence, mental soundness beyond a reasonable doubt," is erroneous, but can not be complained of by the defendant. *Id.*

5. *Frenzy.*—The defendant can not complain of an instruction stating that "Frenzy arising solely from the passions of anger and jealousy, no matter how furious, is not insanity." *Id.*

6. *Same.—Presumptions.*—An instruction, in such case, stated that "the law presumes that a man is of sound mind, until there is some evidence to the contrary. * * * An accused is entitled to an acquittal, if the evidence engenders a reasonable doubt as to the mental capacity at the time the alleged offence is charged to have been committed. Evidence * tending to rebut the presumption of sanity need not, to entitle the defendant to an

acquittal, preponderate in favor of the accused. It will be sufficient if it raises in your minds a reasonable doubt."

Held, that the instruction was correct.

Ib.

7. *Opinion of Medical Expert.—Weight of.*—It was proper to instruct the jury, that, while they should consider the opinions of medical experts in connection with all the other evidence, they were not bound to act thereon to the exclusion of other testimony, but should determine the question of sanity from all the evidence. And that such an opinion "based upon a hypothesis" which is "wholly incorrectly assumed," or incorrect in its material facts to such an extent as to impair the value of the opinion, is of little or no weight."

Ib.

8. *Criminal Court.—Constitutional Law.*—The act establishing the Marion Criminal Circuit Court is constitutional.

Ib.

9. *Weight of Evidence.*—Where, in a criminal prosecution, there is competent evidence tending to sustain every material fact necessary to authorize a verdict against the defendant, the Supreme Court, on appeal, will not disturb such verdict on the mere weight of the evidence.

Mauck v. State, 177

10. *Obstructing Highway.—User.—Presumption.—Dedication.*—On the trial of a defendant indicted for obstructing a public highway by the erection of a fence thereon, it appeared by the evidence that the highway had never been established, nor its boundaries ascertained; that it had been used for more than twenty years; that it adjoined the defendant's land; and that he was the owner of the fee of the part obstructed. The defendant also gave evidence that, twelve years prior to the finding of the indictment, in renewing a fence dividing his land from the highway, he had, as a matter of convenience and not as a dedication to the public, set the new fence in farther on his land, thus throwing the strip of land now in question out with the highway; and that the obstruction charged was a fence erected by him, re-enclosing the strip formerly thrown out. Upon these facts the defendant asked the court to instruct the jury, that, where "the State relies upon an user of less than twenty years, * " she must "give such evidence to the jury as will convince them beyond a reasonable doubt, that the defendant intended to dedicate or grant such ground to the public for the purposes of a public highway."

Held, that the instruction should have been given.

Held, also, that the presumption of dedication, arising from user of less than twenty years, may be rebutted.

Ib.

11. *Murder.—Conduct of Deceased.—Intoxication.*—On the separate trial of a defendant indicted jointly with others for murder, it appeared by the evidence, that, on the day of the killing, the defendant and the deceased had an altercation; that the defendant and others, subsequently meeting the deceased, set upon him to beat him and to take from him a pistol which he refused to give up; that the deceased vainly endeavored to get away; and that the pistol, being wrenched from him, was discharged, whether accidentally or purposely being uncertain, but killing the deceased. There being other wounds upon the deceased not contributing to his death, the defendant, to show that the deceased had received these wounds prior to such assault, offered to prove that the deceased had been intoxicated, boisterous, violent and quarrelsome, during the day on which he was killed.

Held, that the evidence was too remote.

Patterson v. State, 185

12. *Same.—Manslaughter.—Malice.—Purpose.*—It was proper to instruct the jury in such case, that, if the killing was done unintentionally during an affray, or intentionally in hot blood engendered by the combat, but without malice, the crime was no more than manslaughter. But it was erroneous to add, that, 'if the person who does

- the killing entertained malice towards his victim, and out of such malice slew him, his crime would be murder, notwithstanding his blood was heated by the combat." *Ib.*
18. *Killing in Hot Blood.*—It was also erroneous to instruct the jury, that if, in an unprovoked assault by the defendant upon the deceased, the latter was "intentionally and unlawfully" slain by the former, the slayer "is guilty of murder, notwithstanding his blood may have become so heated as to carry him beyond his original purpose." *Ib.*
14. *Liquor Law.—Appeal to Supreme Court, When to be Taken.*—An appeal by the defendant, to the Supreme Court, from the judgment rendered in a prosecution for a violation of the liquor law, must be taken within a year from the rendition of judgment.
McLaughlin v. State, 193
15. *Same.—How Appeal is Taken.*—Such appeal can not be authorized by the court in term time, but must be taken by service of the proper notice upon the clerk of the circuit court and the prosecuting attorney, and the transcript must be filed in the office of the clerk of the Supreme Court within thirty days after service of such notice. *Ib.*
16. *False Pretences to Obtain Board.*—The use of false representations by a third person, as to his property, by means of which, with intent to defraud, he obtains board and lodging, is within section 27 of the felony act, 2 R. S. 1876, p. 486, defining the crime of obtaining goods by false pretences.
State v. Snyder, 203
17. *Same.—Defendant's Knowledge of Falsity of Pretences.*—The charge, in an indictment for such crime, that the false representations were "designedly" made with intent to defraud, imputes to the defendant a knowledge of the falsity of his representations. *Ib.*
18. *Appeal by State.—Waiver of Notice of.*—An appearance and joinder in error by the defendant in a criminal prosecution, in the Supreme Court, on appeal thereto by the State, is a waiver of notice of the appeal.
State v. Hattabough, 223
19. *Jurisdiction of Justice in Felonies.*—A justice of the peace has no jurisdiction to either acquit or convict a defendant charged with a felony: his only authority in such case being that of an examining court, to hear and discharge, or commit and bind over to appear before a court having jurisdiction to try. *Ib.*
20. *Same.—Discharge no Bar to Subsequent Prosecution.*—A discharge by the justice, in such case, is no bar to a subsequent prosecution of the defendant, for the same offence. *Ib.*
21. *Misdemeanor merged in Felony.—Assault and Battery with intent to Murder.—Former Acquittal or Conviction.*—The misdemeanor known as assault and battery, when committed in connection with an attempt to murder, is merged in the felony known as assault and battery with intent to murder, and an acquittal or conviction of the misdemeanor, though by a court of competent jurisdiction, is no bar to a prosecution for the felony; but, if the intent to murder be not established, such acquittal or conviction will bar a conviction of the assault and battery. *Ib.*
22. *No Conviction of Assault and Battery on proof of Assault, etc., with Intent, etc.*—One on trial for simple assault and battery can not be convicted on evidence establishing him guilty of assault and battery with intent to murder. *Ib.*
23. *Trial for Offence including Offences of less Degree.*—A defendant on trial for an offence which necessarily includes another offence or lesser degrees of offence is on trial for the latter as well as the former, and can not be subsequently convicted thereof. *Ib.*

24. *Suffering Minor to Play Billiards.—Fifteen-Ball Pool.—Variance.*—The evidence showing them to be entirely different games, though both played with billiard balls on a billiard table, proof that the defendant allowed the minor to play a game of fifteen-ball pool will not authorize a conviction on an indictment for suffering a minor to play a game of billiards. *Squier v. State*, 317
25. *Evidence.—New Trial.—Waiver.*—Error in the admission of evidence is waived by a failure to assign the same as cause for a new trial. *Robinson v. State*, 331
26. *Forgery of Promissory Note.—Variance.—Alteration.*—An indictment for forgery of a promissory note set out a copy of a note purporting to be the joint and several note of the defendant and the person whose name was alleged to have been forged thereto, dated "Aug. 23d, 1878," payable six months after date with ten per cent. interest, and containing the stipulation, "If paid before maturity ten per cent. interest to be deducted from the face of this note, from time of payment until due." On the margin of both the note and the copy were the words "May pay Oct. 20th, '78." The evidence showed that those words were added by the payee, in pencil, after the delivery of the note, for his own convenience, and as a memorandum of the time at which the defendant stated he would probably pay off the note.
Held, that the addition was immaterial, and that it was proper to so instruct the jury. *Ib.*
27. *Same.—Instruction Modified.—Intent Inferred from previous Crime.*—There having been evidence on the trial of such cause, that the note in suit had been given for the purchase price of a certain chattel, and that the defendant had, immediately previous to the forgery charged, forged but destroyed a promissory note on a third person for the same purchase price, the defendant asked the court to instruct the jury to disregard the evidence as to the previous forgery, but the court, in giving the same, modified it by adding that such previous forgery, "if proved beyond a reasonable doubt, may be taken into consideration for the purpose of showing * guilty intent" in the forgery charged in the indictment.
Held, that the modification was proper. *Ib.*
28. *Prostitute.—Affidavit and Information.*—Under section 5 of the act of 1877, Acts 1877, Spec. Sess., p. 80, defining the offence of being a prostitute, it is necessary to the sufficiency of an affidavit and information charging such offence, that they charge the defendant with the commission of acts constituting such offence. *Delano v. State*, 348
29. *Change of Venue.—Bias of Judge.*—A defendant in a criminal prosecution is entitled to one, and only one, change of judge on account of his bias or prejudice; and the court has no discretion to refuse it. *Duggins v. State*, 350
30. *Special Judge.—Failure to perfect Change from.*—When, in such case, a change of judge is ordered by a special judge, but is not perfected, and no judge to try the cause is either appointed or called, and the defendant is recognized to appear at the next term of court, at which the regular judge presides, it is error to refuse an application by the defendant, upon a sufficient affidavit, for a change of venue from such regular judge. *Ib.*
31. *Supreme Court.—Defective Record.*—The Supreme Court will not pass upon any proceeding, when some essential part thereof is omitted from the record. *Kennedy v. State*, 370
32. *Same.—Postponement.—Affidavit.—Bill of Exceptions.*—Where an affidavit, which purports to be the one upon which a motion to postpone the trial of a criminal cause was founded, is simply copied into the record by the clerk without any order of court and not as a part of any bill of ex-

ceptions, it is improperly in the record, and in legal contemplation does not constitute any part thereof, and no question as to its sufficiency is presented. *Id.*

83. *Murder.—State of Feeling between a Witness and Deceased.—Harmless Evidence.*—Upon the trial of a person charged with the murder of his wife, evidence as to the state of feeling existing between a witness on behalf of the State and the deceased, before her death, and seven years before the trial, was irrelevant, but harmless to the defendant. *Binns v. State*, 428
84. *Same.—Parol Evidence of Pendency of Divorce Suit by Deceased against Accused.*—In such case, parol evidence was admissible to show that a suit for divorce and alimony had been pending, wherein the deceased was plaintiff and the accused was defendant. *Id.*
85. *Same.—Attorney.—Conversation of, with Witnesses.*—In a prosecution for murder, a subpoena for witnesses, which the accused had caused to be issued on a former trial, and testimony that an attorney for the accused had had a conference with such witnesses, but not tending to elicit the conversation, were useless to the case as evidence, but harmless to the accused. *Id.*
86. *Same.—Instructions.—Inference from Facts.*—An instruction to the jury, substantially, that, in determining what facts were proved in the cause, they should carefully consider all the evidence given before them, together with all the circumstances of the transaction in question detailed by the witnesses during the trial, and that they might find any fact to be proved, which might be rightfully and rationally inferred from the evidence given, is correct. *Id.*
87. *Same.—Premeditated Malice.*—An instruction, that premeditated malice is where the intention to unlawfully take life is deliberately formed in the mind, and that determination meditated upon before the fatal stroke is given, but that there need be no appreciable space of time between the formation of the intention to kill and the killing, that they might be as instantaneous as successive thoughts, and that it is only necessary that the act of killing be preceded by a concurrence of will, deliberation and premeditation on the part of the slayer, is proper. *Id.*
88. *Same.*—An instruction asked on behalf of the defendant, that the tracks of some person, attempted to be proved as leading to and from the window of the house where the deceased was at the time of the alleged shooting, is a material circumstance in the case, and if, from all the evidence in the cause, the jury should have a reasonable doubt as to whether the defendant made such tracks, they should find him not guilty, does not express the law, as the defendant's guilt might have been established by other evidence. *Id.*
89. *Same.—Weight of Evidence.*—Where instructions asked assume, as proved, that the accused had made certain statements when arrested, and instruct the jury as to the weight to be given to certain testimony, they ought to be refused. *Id.*
40. *One Instruction Corrected by Another.*—An instruction which is contrary to law can not be corrected by a correct instruction on the same subject, unless the former be withdrawn; but an instruction which is merely imperfect because it does not fully state the law, yet states it correctly as far as it goes, may be completed by another instruction which supplies its defect. *Id.*
41. *Clerical Error in Instruction.*—Where a clerical error in an instruction is plainly shown and corrected by the context, the accused, in whose favor such error would operate, can not complain of it. *Id.*
42. *Same.—Harmless Refusal.*—Where an instruction given by the court

covers the ground of one asked by the defendant and refused, the refusal is harmless. *Id.*

43. *Obstructing Highway.—Description.*—An indictment for obstructing a public highway should describe its location with more particularity than the mere allegation that it was situated in a certain township, county and state. *State v. Stewart*, 555

44. *Sale of Lottery Ticket.—Vincennes University Lottery.—Vested Right.*—Upon a prosecution for the alleged unlawful sale of a ticket in a certain gift enterprise and lottery scheme, the following facts were admitted: That, by an act approved Sept. 17th, 1807, passed by the Indiana Territorial Legislature, "The Vincennes University" was instituted and incorporated within said territory, and certain named trustees and their successors created a body corporate and politic, with continuous succession; that, by section 15 of said act, to raise money for the purpose of procuring a library and the necessary philosophical and experimental apparatus for said University, not to exceed the lawful amount, a lottery was authorized and provision made for the manner in which it should be conducted; that, in 1879, pursuant to said section 15, a lottery scheme was organized, in the mode therein prescribed, and the ticket sold, for the sale of which said prosecution was instituted; that no other lottery had ever been held and no other attempt made to carry out the provisions of said section; and that no funds had ever been raised for the purpose therein named.

Held, that the prosecution can not be maintained.

Held, also, that, under the fundamental law for the government of Indiana Territory, the territorial legislature had power to incorporate said University with perpetual succession, and to endow it with the lottery privilege, for the purpose named.

Held, also, that the grant of such lottery privilege has never been annulled or repealed and is still in force.

Held, also, that the institution incorporated was a private corporation, and when the board of trustees thereof accepted the terms of the act of incorporation, and the institution was organized thereunder, the lottery privilege became a matter of contract and vested right, which could not be abridged, impaired or annulled by any government thereafter organized within said territory. *Kellum v. State*, 588

CURATIVE STATUTE.

See BOUNTY, 1; TURNPIKE, 4.

DAMAGES.

See EXCESSIVE DAMAGES; MEASURE OF DAMAGES; MITIGATION OF DAMAGES; NEGLIGENCE, 8, 9; SLANDER; SUPREME COURT, 18.

DEATH.

See FRAUDULENT CONVEYANCE, 2; PRACTICE, 10; SHERIFF'S SALE, 2; STATUTE OF LIMITATIONS.

DECEDENTS' ESTATES.

See APPEAL; BASTARDY, 6; CONTRACT, 1 to 3; FRAUDULENT CONVEYANCE, 2; PRACTICE, 10.

1. *Claim.—Amendment.—Additional Paragraph.*—After the transfer, from the appearance to the issue docket, of a claim filed against the estate of a testator, the claimant, without objection by the executor, filed an additional paragraph, stating substantially the same cause of action embraced in the original claim, though in a different manner. The executor, after having appeared and filed a demurrer, withdrew the demurrer and moved to strike out such paragraph.

Held, that, by his appearance and demurrer, the executor waived the objection that such paragraph had not been filed and placed on the appearance docket, and, therefore, that the motion should be overruled.

Fraser v. Boss, 1

2. *Set-Off.—Maturity of.*—Where a cross demand against an estate is a proper set-off to a claim in favor of the estate, the fact that it was not due at the time of the decedent's death does not deprive the holder of the benefit of the set-off, if it be due at the time it is pleaded.

Convery v. Langdon, 311

3. *Same.—Payment of Debt by Surety, after Death of Principal.*—In an action by the administrator of the estate of an intestate, on an indebtedness due to the decedent from the defendant, the latter answered by way of set-off, admitting the indebtedness in suit, but alleging that he had become surety for the decedent on a promissory note executed by them, and that, after the decedent's death, he had been obliged to pay off the note, and had since recovered judgment thereon against the estate.

Held, on demurrer, that the answer is insufficient.

Held, also, that the solvency or insolvency of the estate has no bearing on the rule of law in such cases. *Id.*

DECLARATIONS.

See WILL, 2.

DEDICATION.

See CRIMINAL LAW, 10.

DEFAULT.

See SUPREME COURT, 16.

DELAY.

See EXECUTION, , INJUNCTION BOND, 2; MALICIOUS PROSECUTION, 1; SUPREME COURT, 13.

DELIVERY.

See EVIDENCE, 2; FRAUDULENT CONVEYANCE, 1; PROMISSORY NOTE, 8.

DEMAND.

See BOUNTY, 2; CONTRACT, 1, 3; CONVERSION.

DEMURRER.

See COMMON SCHOOLS, 1; CONVERSION; DECEDENTS' ESTATES, 1; DITCHES AND DRAINS, 3; FRAUDULENT CONVEYANCE, 3; MALICIOUS PROSECUTION, 3; MALPRACTICE, 2; PLEADING, 4 to 8, 11; PRACTICE, 11 to 14; PROMISSORY NOTE, 14, 19; SPECIAL DEMURRER.

DEMURRER TO EVIDENCE.

1. *When may be Filed.*—Either party to an action on trial by a jury may, on conclusion of the evidence in chief of the opposite party, interpose a demurrer to the evidence, and all of the evidence then in must be considered in ruling upon the demurrer. *Thomas v. Ruddell*, 326
2. *Record.—Supreme Court.*—Where, in such case, an appeal is taken to the Supreme Court, the record should contain all of the evidence. *Id.*
3. *Effect to be given to Evidence.*—In deciding upon a demurrer to evidence, the court must find against the party demurring, if, upon any reasonable construction of the evidence, the jury might have found for the opposite party, had the case gone to them for a verdict. *Id.*

DEPARTURE.

See PROMISSORY NOTE, 17.

DEPOSITIONS.

1. *Motion to Strike Out.*—Where a motion is made, as an entirety, to strike out a certain question and the answer thereto in a deposition, and some of the matter to which the motion is directed is free from objection and pertinent to the issues in the cause, it will be correctly overruled. *Lee v. Hills*, 474
2. *Sufficiency of Officer's Certificate to.*—The certificate annexed to depositions was substantially as follows: "I," etc., "a notary public in and for," etc., "duly commissioned," etc., "do hereby certify that the above named," etc., "were by me first duly sworn," etc., "to testify the truth,"

etc., "relating to said cause; that said depositions were reduced to writing by me; that the said," etc., "adverse party herein, did not attend by attorney or in person, and said depositions were taken at the law-office of," etc., "in," etc., "on," etc., "between the hours of," etc. "In testimony," etc.

Held, that this certificate fills the requirements of the statute.

Guthrie v. Buckeye, etc., Co., 548

DILIGENCE.

See CONTINUANCE.

DIRECTORS OF NORTHERN PRISON.

See STATE PRISON NORTH.

DISBARMENT.

See ATTORNEY.

DISCLAIMER.

See REPLEVIN, 5.

DISMISSAL.

See REPLEVIN, 5; SUPREME COURT, 8.

DITCHES AND DRAINS.

1. *Act of 1875.—Petition.—Description of Lands.*—Section 2 of the drainage act of March 9th, 1875, 1 R. S. 1876, p. 428, does not contemplate a very accurate description, in the petition for a ditch, of the lands to be affected thereby. *Spahr v. Schofield*, 168
2. *Description in Viewers' Report.*—The description of such lands, in the report of the viewers establishing the ditch, should be sufficiently accurate to enable the auditor to describe the lands on the tax duplicate. *Ib.*
3. *Demurrer.—Motion to Dismiss.*—Pleadings are not contemplated on an appeal to the circuit court from an order by a board of commissioners establishing a ditch, but a demurrer to the proceedings for insufficiency of facts is equivalent to a motion to dismiss. *Ib.*
4. *Act of 1867.—Complaint to Collect Assessment.—Appraisers.*—In an action to collect an assessment for drainage purposes, made under the act of March 11th, 1867, 2 R. S. 1876, p. 684, the complaint must allege that the persons by whom the assessment was made were "disinterested freeholders of the county in which the application is made, and not of kin," etc. *Laughlin v. Ayres*, 445
5. *Draining Association.—Personal Liability of Stockholders for Debts of.—Complaint.*—In an action to recover, personally, from certain stockholders in a draining company, the amount of a judgment previously rendered in plaintiff's favor, against such company, for work and labor performed by the plaintiff for the company, an allegation in the complaint "that all of said defendants, together with this plaintiff, had signed the articles of association of said * * association, and were members thereof at the time of the performance of said labor, and at the time of the rendition of said judgment therefor," sufficiently shows that the defendants were members of the company at the time the debt in question was contracted. *Reeder v. Maranda*, 485
6. *Debt Contracted previous to Membership.*—A stockholder is not liable for debts of the company contracted before he became a member. *Ib.*
7. *Fraud and Misrepresentation.*—In such case, a paragraph of answer setting up fraud and misrepresentation in procuring the defendants to become members of the corporation, but not in any way implicating the plaintiff in either, is no defence to the action. *Ib.*

DIVORCE.

See PROMISSORY NOTE, 9.

DOCKET FEES.

See FEES AND SALARIES.

DRAINING ASSOCIATION.

See DITCHES AND DRAINS, 5 to 7.

DURESS.

See WILL, 1 to 3.

ENDORSEMENT.

See PROMISSORY NOTE, 18 to 21.

ESTOPPEL.

See COMMON SCHOOLS, 2; COUNTY AUDITOR, 3; HIGHWAY, 1; SUPREME COURT, 16; TURNPIKE, 5.

City Treasurer.—Action on Bond of Defaulting Treasurer.—Sureties not Estopped by Entries of Principal.—The entries made by a city treasurer in the books kept for that purpose, purporting to be a statement of the funds of the city on hand at the close of a preceding and the beginning of a new term, are not conclusive upon, but may be contradicted by, his sureties, in an action against the treasurer and his sureties on his official bond, executed by them at the commencement of the new term. *The State, ex rel., v. Grammer*, 29 Ind. 530, and *The State, ex rel., v. Prather*, 44 Ind. 287, overruled. *Ohning v. City of Evansville*, 69

EVIDENCE.

See BILL OF EXCEPTIONS, 3; BILL OF PARTICULARS; CHATTEL MORTGAGE, 1, 3, 4; CITIES AND TOWNS, 5; CONTRACT, 2, 4; COVENANT; CRIMINAL LAW, 3, 6, 7, 9 to 11, 21, 22, 25, 26, 33 to 36, 39; DEMURREE TO EVIDENCE; DEPOSITIONS; GUARDIAN AND WARD, 2; MALICIOUS PROSECUTION, 1; MALPRACTICE, 2; NEGLIGENCE, 3, 4, 7 to 10, 15; PAYMENT, 1; PRACTICE, 8, 15, 16; PROMISSORY NOTE, 1 to 3, 6, 11, 12, 21; SPECIFIC PERFORMANCE, 1; STATUTE OF FRAUDS; SUPREME COURT, 3 to 5, 7, 9 to 12, 14.

1. *Explaining Mutilation of Promissory Note.*—It appearing that the signature to the note in suit had been torn off, and then re-attached, it was proper to admit the note in evidence on proof tending to show that the mutilation was the innocent act of a child. *Frazer v. Ross*, 1
2. *Delivery.—Sale.*—The delivery of goods pursuant to a written order for their shipment, and the quality and kind of the goods, can be proved by parol evidence. *Lee v. Lilla*, 474
3. *Cellar.*—Where the question as to whether or not a cellar is wet is in issue, the evidence of a witness who has never seen it, but who will testify, from the description of it given by other witnesses and from his knowledge of the condition of a cellar in a house at one time owned by him within a square of the cellar in question, that it can not be kept dry in wet weather, is not competent. *Cook v. Fuson*, 521
4. *Conversion.—Practice.*—On the trial of an action for the conversion of lumber, wherein the plaintiff has given no evidence concerning lumber in the defendant's possession, the latter will not be permitted to prove the kind and quality of lumber in his possession and how he obtained it, as evidence that it is not the lumber in controversy. *Whistler v. Teague*, 565

EXCEPTION.

See GUARDIAN AND WARD, 2; INSTRUCTIONS, 1; SUPREME COURT, 9.

EXCESSIVE DAMAGES.

See SEDUCTION; SUPREME COURT, 6, 13, 14.

EXECUTION.

See INJUNCTION BOND, 2; REPLEVIN, 1, 2; SHERIFF'S SALE.

1. *When Delay in Levying does not affect Lien.—Priority.*—Where there are no junior liens of any kind upon the personal property of the execution defendant, directions by the execution plaintiff to delay proceedings

upon an execution in his favor do not affect the lien of his execution.

Griffin v. Wallace, 410

2. *Effect of Assignment on Lien of.*—The simple assignment of his property by an execution defendant, for the benefit of his creditors, does not divest the lien of the execution. *Id.*
3. *Sale of Mortgaged Goods on.—Justice of the Peace.*—On the filing of an affidavit by the judgment creditor, alleging that delay in issuing execution will endanger the collection of his judgment, a justice of the peace may issue an execution thereon, immediately on its rendition; and a sale, by a constable, on such execution, after due notice, of goods covered by a chattel mortgage, is not void. *Conrad v. Wilson*, 437
4. *All Property of Debtor prima facie Subject to.—Exemption.*—Under the statutory provisions bearing upon the seizure and sale of property upon execution, construed together, all the property of execution defendants in this State is, *prima facie*, subject to execution, and it is the duty of an officer holding an execution to proceed until some claim for exemption is lawfully interposed. *Terrell v. State, ex rel.*, 570
5. *Same.—Action against Officer for Failing to Levy.—Defence*—In an action against a sheriff for failing to levy upon property, it may be shown in defence that the property was exempt from levy and sale; but, to avail as a defence, such exemption must be affirmatively shown. *Id.*
6. *Same.—Averment as to Value of Property.*—In such case, an averment in the complaint, that the execution defendant, at the time the execution was in the sheriff's hands, "owned a large amount of both real and personal property,—more than enough to pay and satisfy said execution," is equivalent to an averment that such property was of some value, and of greater aggregate value than the amount of the relator's judgment. *Id.*
7. *Same.—What constitutes Service of Execution.*—The service of an execution is the communication of its contents to the execution defendant, accompanied by or followed with a demand for its satisfaction, and in its natural order precedes the levy of the execution. *Id.*

EXEMPTION.

See EXECUTION, 4, 5.

EXHIBIT.

See COPY.

EXPERT.

See CRIMINAL LAW, 3, 7; PROMISSORY NOTE, 2, 3.

EXTENSION OF TIME.

See TURNPIKE, 8.

FALSE PRETENCES.

See CRIMINAL LAW, 16, 17.

FEES AND SALARIES.

Statutes Construed.—Docket Fees belong to State.—The docket fees taxed to the losing party by the clerk under the fee and salary acts of March, 1871, March 8th, 1873, and March 12th, 1875, did not belong to him, but were to be paid over by him into the county treasury; and, under section 6 of the act of March 5th, 1859, 1 R. S. 1876, p. 775, such fees must be paid over to the State as her property.

State, ex rel., v. Board of Comm'rs, etc., 216

FORCIBLE ENTRY AND DETAINER.

1. *New Trial.—Assignment of Error.—Motion to remand Cause to Justice to be Certified.—Title to Land.*—In an action originating before a justice of the peace, for forcible entry and detainer, the defendant, in the circuit court on appeal, moved the court, on the ground that the title to real estate had been duly put in issue before the justice by a verified

answer, to remand the cause to the justice to be certified by him to the circuit court, pursuant to section 12, 2 R. S. 1876, p. 607. This motion was overruled, and the action of the court in overruling it was made ground of a motion for a new trial.

Held, that such ruling was not ground for a new trial, but should have been assigned independently in the Supreme Court as error.

Tibbetts v. O'Connell, 171

2. *Force.—Fraud.—Arrest.*—The wife of an outgoing tenant having delivered the key to the property to one of the family of a third person for delivery to the landlord, such third person took possession of the property without leave from the landlord. The landlord, afterward finding such intruder away from the property, broke in and removed the chattels of the latter into the street. They two having agreed that the chattels should be placed on an adjoining lot, the landlord departed leaving the house in temporary possession of an agent, but both the landlord and the agent having been arrested and carried before a justice, where they were at once discharged by the officer, such intruder again took possession without leave. *Held*, that the landlord could maintain an action for forcible entry and detainer. *Id.*

FORECLOSURE.

See MISTAKE, 1.

FORFEITURE.

See CONVEYANCE.

FORGERY.

See CRIMINAL LAW, 26 27.

FORMER ACQUITTAL OR CONVICTION.

See CRIMINAL LAW, 19 to 23; HABEAS CORPUS.

FORMER ADJUDICATION.

See COVENANT; PROMISSORY NOTE, 5.

FRAUD.

See CONTRACT, 1; DITCHES AND DRAINS, 7; FORCIBLE ENTRY, 2; MISTAKE, 2; PARTNERSHIP, 2; PROMISSORY NOTE, 11, 16, 20; SHERIFF'S SALE, 3; WILL, 1 to 3.

1. *Vendor and Purchaser.—Fraudulent Representations.—Promissory Note and Mortgage.—Injunction.—Rescission.*—False and fraudulent representations that the title is good and unencumbered, made by the grantor to the grantee of real estate conveyed by a warranty deed, are grounds sufficient for a counter-claim to enjoin personal judgment against the grantee, in an action against him, by an assignee, on a promissory note not payable in bank, and to foreclose a mortgage on such real estate, executed by the grantee to the grantor to secure the payment of the purchase-money for the same. *Reed v. Tioga Mfg Co.*, 21
2. *Failure to Complain.*—Where fraud is alleged as a defence to an action on a contract to pay money, the fact that the debtor never complained of the alleged fraud, in conversing with the creditor about the payment of the money, may be considered against the debtor.

Cook v. Fuson, 521

FRAUDULENT CONVEYANCE.

1. *Action to Recover and Quiet Title.—Acceptance.—Delivery.*—In an action to recover the possession of, and to quiet the title to, certain real estate, the jury, by a special verdict, found that A., the plaintiffs' grantor, being the owner in fee, and in the possession, of such real estate, without the knowledge, assent or acceptance of the grantees, had executed, acknowledged and, six months later, placed on record, but had never delivered, a deed purporting to convey to the plaintiffs, his minor children, in consideration of natural love and affection, the lands in controversy; that such deed was made with intent to cheat, hinder, delay and de-

fraud his creditors, and not for the purpose of saving the lands for his children ; that he had remained in possession until he had conveyed to the defendant ; that, prior to the execution of the deed, he had mortgaged a portion of the land to the school fund, and, after such deed had been recorded, had purchased such portion and received a conveyance therefor, from the county auditor, on a sale under such mortgage ; that, subsequent to the recording of the deed to the plaintiffs, the residue thereof had been sold at sheriff's sale on an execution against A., to the execution creditor, who thereupon conveyed to A. ; and that, subsequent to the recording of all of such deeds, A. had conveyed the lands in question to the defendant, who, in good faith, paid a valuable consideration therefor.

Held, that the defendant is entitled to judgment. *Tharp v. Jarrell*, 52

2. *Complaint by Surety of Defaulting Guardian.—Death Presumed from Absence.—Decedents' Estates.—Heirs.*—In an action by the surety of a defaulting guardian, against the guardian and another, to set aside an alleged fraudulent conveyance of real estate by the guardian to his co-defendant, the complaint alleged that the guardian had been duly appointed and qualified, with the plaintiff as surety on his bond, and had received certain moneys belonging to his wards, which he had failed to account for, and which the plaintiff as surety, had been obliged to pay ; that the guardian, being the owner of the real estate in question by virtue of an unrecorded deed, and intending to defraud his creditors, destroyed his deed and procured his grantor to execute a deed conveying the same to his codefendant, who was then an infant ; that the guardian became insolvent, and had been absent from the State, and had not either been seen or heard from, for over fifteen years, and that, he being presumptively dead, the codefendant was his sole heir.

Held, on demurrer, that the guardian is presumed to be dead, that the plaintiff's claim can not be prosecuted against the heir until administration be had on the guardian's estate, and therefore that the complaint is insufficient. *Baugh v. Boles*, 376

3. *Same.—Limitations.—Exception.—Demurrer*—An action to set aside a fraudulent conveyance must be brought within six years ; but, though the complaint show the expiration of the six years prior to bringing the action, that fact does not render it insufficient on demurrer unless it also shows that the action does not fall within any of the exceptions to the statute. *Ib.*

GAS COMPANY.

See CITIES AND TOWNS, 1.

GUARDIAN AD LITEM.

See PARTITION, 2.

GUARDIAN AND WARD.

See FRAUDULENT CONVEYANCE, 2 ; PARTITION, 2.

1. *Final Settlement.—Judgment.—Appeal.*—To authorize an appeal from the final settlement of a guardianship, such settlement must be of such a nature as to fully discharge the guardian from his trust and all duties in regard thereto, and leave nothing to be done by him in his fiduciary capacity. *Angevine v. Ward*, 460
2. *Same.—Bill of Exceptions.—Record.*—Written exceptions to the reports of a guardian, and oral evidence adduced upon the hearing thereof, can only be made parts of the record by a bill of exceptions. *Ib.*

HABEAS CORPUS.

Void Verdict.—Murder in Second Degree.—Criminal Law.—Once in Jeopardy.—*Acquittal.*—A joint petition against a sheriff, by two persons, for a writ of *habeas corpus*, recited that the petitioners had been jointly tried

in the circuit court, on a joint indictment for murder in the second degree; that the jury had returned a verdict finding them guilty as charged, and fixing their punishment at imprisonment in the state-prison for two years; that the jury had been discharged by the court, after a statement by the defendants that they had motions to make and waived none of their rights; that the court had denied the defendants' motion to be discharged, but had granted them a *venire de novo*; that the court continued the cause until the next term of court, ordering them to be recognized to appear at that term; and that the defendants, having failed to give bond, were taken into custody by the sheriff.

Held, on the petition, and on a return by the sheriff showing the same facts, that the writ will not lie.

Held, also, BIDDLE, J., dissenting, (the statutory punishment for murder in the second degree being imprisonment for life,) that the verdict was void, but that the defendants had been once in jeopardy and can not be tried again. *Wentworth v. Alexander*, 39

HANDWRITING.

See PROMISSORY NOTE, 2, 3.

HARMLESS RULING.

See CRIMINAL LAW, 33, 35, 42; INSTRUCTION, 3; PARTNERSHIP, 1; PAYMENT, 2; PLEADING, 4, 5, 8, 11.

HEIRS.

See FRAUDULENT CONVEYANCE, 2; SPECIFIC PERFORMANCE, 1

HIGHWAY.

See OBSTRUCTING HIGHWAY.

1. *Location and Change of.—Successive Remonstrances.—Public Utility.—Damages.—Estoppel.*—Whenever any one is aggrieved by a proposed location, opening or change of a highway, he may, under section 19, 1 R. S. 1876, p. 532, at any time before final action therein by the board of commissioners, set forth his grievances by way of remonstrance, and obtain an assessment of his damages in the mode prescribed by law; and the fact that his remonstrance was first directed solely to the public utility of the proposed location or change of highway, and that reviewers appointed on such remonstrance have made a report that such location or change is of public utility, does not estop such aggrieved person from afterward presenting his claim for damages, by way of remonstrance on that ground, at any time before final action by the board. *Bowers v. Snyder*, 340
2. *Appeal to Circuit Court.—Trial de novo.*—On appeal from the board of commissioners to the circuit court, in cases concerning the location, vacation or change of highways, there must be a trial *de novo* of the whole case. *Ib.*

HUSBAND AND WIFE.

See MALPRACTICE; MECHANIC'S LIEN; NEGLIGENCE, 4; PROMISSORY NOTE, 9; REPLEVIN, 3 to 5; SHERIFF'S SALE, 2 to 4, 6 to 9; SPECIFIC PERFORMANCE, 1, 2.

HYPOTHETICAL QUESTION.

See CRIMINAL LAW, 3, 7.

IMPEACHMENT.

See WITNESS.

INDEMNITY.

See PLEADING, 1.

INDICTMENT.

See CRIMINAL LAW, 1, 16, 17, 26, 28, 43.

INFANT.

See PARTITION, 2.

INFORMATION.

See CRIMINAL LAW, 28.

INJUNCTION.

See COUNTY, 1; FRAUD, 1; PLEADING, 10; SHERIFF'S SALE, 2; TURNPIKE, 5.

INJUNCTION BOND.

1. *Approval of Judge need not be Endorsed on Bond.—Pleading.—Surety's Name need not Appear in Bond.*—In a proceeding to obtain an injunction, it is proper that the approval of the court or judge should be endorsed upon the bond; but this is not absolutely essential, as the fact that the court orders an injunction to be issued will be considered as conclusive evidence that the court approved such bond; and, in a suit on the bond, an answer denying the approval thereof by the judge is bad, when such fact is so shown by the record. Nor is it material that the name of the surety should appear in the body of the bond.
Griffin v. Wallace, 410
2. *Assignment for Benefit of Creditors.—Delay in levying Execution.*—In a suit by A., upon a bond given in a proceeding by B., an assignee, against A., to enjoin a levy upon an execution, a paragraph of answer, to the effect that after the execution sought to be enjoined was issued, A., the execution plaintiff, directed the constable having possession of said execution to delay levying the same until further orders, and that, under said direction, execution was not levied until after the assignment of his property by the execution defendant to B. for the benefit of his creditors and the recording of said assignment, whereby the lien of said execution was lost, etc., does not state facts which would have constituted sufficient ground for an injunction, had they been incorporated in the complaint in the injunction suit, and such answer is, therefore, bad on demurrer. *Id.*
3. *Same.—Assignee.—Judgment.*—In such case, an answer by B., that the bond in suit was executed by him in his capacity as trustee, and that the trust estate is not settled, is bad on demurrer. Its facts constitute no bar to the suit, and could only affect the form of the judgment. *Id.*
4. *Damages.*—When an injunction is obtained without cause, the obligee in the bond given in that proceeding is entitled, in a suit upon such bond, to recover full compensation. *Id.*

INSANITY.

See CRIMINAL LAW, 8 to 7; WILL, 1 to 3.

INSOLVENCY.

See DECEDENTS' ESTATES, 3; SHERIFF'S SALE, 2.

INSTRUCTION TO JURY.

- See BILL OF PARTICULARS; CONTRACT, 2; CRIMINAL LAW, 4 to 7, 10, 12, 13, 27, 36 to 42; NEGLIGENCE, 2; NEW TRIAL, 2; PRINCIPAL AND AGENT; PROMISSORY NOTE, 4, 6, 17; SPECIFIC PERFORMANCE, 3; SUPREME COURT, 2, 7, 12; WILL, 2, 3.
1. *Supreme Court.—Record.—Signature of Judge.—Exception.—Bill of Exceptions.*—On appeal to the Supreme Court, the record set out, without a bill of exceptions, the instructions of the court to the jury, and also the file-mark and signature of the clerk of the court below, showing the fact and the date of their filing, accompanied, also, by his statement that the same had been given on motion of the defendant. On the margin of the record, opposite one of such instructions, was the word "Given," preceding what purported to be the signature of the judge, and also the words "Excepted to at the time by Plaintiff," preceding what purported to be the signature of the plaintiff's attorney; but the instruction nowhere appeared to have been signed by the defendant or his attorney.

Held, that the instruction is properly in the record, and that the defendant can not object that he had not signed the same. *Choen v. Porter*, 194

2. *Must be Relevant to the Issues*.—The instructions of the court to a jury must be relevant to the issues. *Howe Machine Co. v. Reber*, 498

3. *Harmless Refusal*.—Where an instruction given embraces the substance of one refused, the refusal is harmless. *Hinds v. Overacker*, 547

INTEREST.

See BOUNTY, 2; COMMON SCHOOLS; CONTRACT, 3; PROMISSORY NOTE, 19; SUPREME COURT, 2.

Common Law.—Interest is of purely statutory, and not of common-law, origin. *Frazer v. Boss*, 1

INTERROGATORIES TO JURY.

See CONTRACT, 1; NEGLIGENCE, 1; PRACTICE, 1 to 8; SPECIAL FINDING; SPECIFIC PERFORMANCE, 3.

Uncertainty in Answers.—It was held in this case, that the court did not err in refusing to require the jury to make more definite their answers to certain interrogatories. *Town of Westerville v. Freeman*, 255

INTOXICATION.

See CRIMINAL LAW, 11.

JUDGMENT.

See GUARDIAN AND WARD, 1; INJUNCTION BOND, 3; MISTAKE, 1; PARTITION, 4; PLEADING, 2; PRACTICE, 9; PROMISSORY NOTE, 9; REVIEW OF JUDGMENT; SUPREME COURT, 1.

Objection to Form of.—If the form of a judgment is unsatisfactory to a party, he must make a motion to modify it, to reserve any question thereon. *Forgey v. First National Bank, etc.*, 123

JURISDICTION.

See CRIMINAL LAW, 19 to 23, 29, 30; PROMISSORY NOTE, 9; SLANDER; SURETY OF PEACE; WAIVER.

JUROR.

See CRIMINAL LAW, 2; SUPREME COURT, 15.

JUSTICE OF THE PEACE.

See BASTARDY, 1 to 5; CRIMINAL LAW, 19, 20; EXECUTION, 3; FORCIBLE ENTRY.

LESSOR AND LESSEE.

See MINES AND MINING.

LEVY.

See EXECUTION.

LIEN.

See EXECUTION; MECHANIC'S LIEN; SHERIFF'S SALE, 2; TURNPIKE, 6; VENDOR'S LIEN.

LIFE-ESTATE.

See WILL, 4.

LIMITATIONS.

See STATUTE OF LIMITATIONS.

LIQUOR LAW.

See CRIMINAL LAW, 14, 15.

Sale made after Granting, but before Issuing, License.—*Cases Overruled*.—Under sections 5 and 8 of the liquor law, 1 R. S. 1876, p. 871, a license to retail intoxicating liquors can not be granted for a greater or less time than one year, and the license is issued as of the date it is granted; and where the proper officers receive the applicant's money and issue his license, after the date of his license and of the grant thereof, he can not thereafter be prosecuted for a sale made after the grant, but before

the issue, of his license, as for a sale made without license. To the extent of any actual conflict between the decision in this case and the cases of *Houser v. The State*, 18 Ind. 106, *Schlict v. The State*, 31 Ind. 246, and *Wiles v. The State*, 33 Ind. 206, the latter are overruled.

The State v. Wilcox, 557

LOTTERY.

See CRIMINAL LAW, 44.

MALICIOUS PROSECUTION.

1. *Evidence.—Delay.—Dismissal of Prosecution.*—In an action for damages for malicious prosecution, the jury may consider, as tending to support the action, evidence of delay by the defendant in instituting the prosecution complained of, delay in bringing it to a trial after its institution, and the dismissal of the prosecution without a trial. *York v. Webster*, 50
2. *Complaint.*—A complaint for damages for malicious prosecution, which fully alleges the institution of a criminal prosecution of the plaintiff by the defendant, acquittal thereof, malice, want of probable cause and damage, is sufficient. *Schoonover v. Reed*, 598
3. *Same.—Pecuniary Damages.—Motion to make Certain.—Demurrer.*—The failure of the complaint in such case, to state the particular amount of expense to which the plaintiff alleges he was subjected in resisting the criminal prosecution, may be reached by a motion to make certain, but not by demurrer. *Id.*

MALPRACTICE.

1. *Malpractice.—Action by Wife.—Joinder of Husband.—Party.*—Under section 8 of the practice act, 2 R. S. 1876, p. 36, the husband must join with the wife in an action by her against a physician for malpractice; but, under the act of March 26th, 1879, Acts 1879, p. 160, she may sue alone. *Barnett v. Leonard*, 422
2. *Same.—Complaint.—Defect of Parties.—Demurrer.—Evidence.*—In an action by a married woman, brought by her in the name of herself and husband, but demanding damages solely in her own right, against a physician, for malpractice, she alleged, as a reason why her husband had not joined her in the action, that he had abandoned her and left the State.
Held, that a demurrer for a defect of parties plaintiffs should be sustained, but that such defect is not presented by a demurrer for insufficiency.
Held, also, that evidence of the alleged abandonment of the wife by the husband was incompetent. *Id.*

MANDATE.

See STATE PRISON NORTH, 4.

MANSLAUGHTER.

See CRIMINAL LAW, 12, 13.

MARION CRIMINAL CIRCUIT COURT.

See CRIMINAL LAW, 8.

MARRIAGE PROMISE.

See CONTRACT.

MARRIED WOMAN.

See HUSBAND AND WIFE; MALPRACTICE; MECHANIC'S LIEN; REPLEVIN, 3 to 5; SHERIFF'S SALE, 2 to 4, 6 to 9; SPECIFIC PERFORMANCE, 1, 2.

MASTER AND SERVANT.

See NEGLIGENCE, 17.

MEASURE OF DAMAGES.

See BILL OF PARTICULARS; INJUNCTION BOND, 4; PROMISSORY NOTE, 16; SEDUCTION.

MECHANIC'S LIEN.

1. *Married Woman*.—In a complaint to enforce a mechanic's lien against the property of a married woman, an allegation that "said improvements were necessary for the full and complete enjoyment of said real estate" sufficiently shows that they were for the "betterment" of her estate. *Skilling v. Templeton*, 585
2. *Same*.—*Act Repealed by Implication*.—When a married woman makes improvements upon her separate estate by building, it is not necessary that she should contract with a view of charging such estate, as it is the law and not the contract which gives the mechanic his lien. If there is any irreconcilable conflict between the proviso to section 5 of the act touching the marriage relation, 1 R. S. 1876, p. 550, and the law on the subject of mechanic's liens, the latter, being the later law, must prevail. *Id.*

MERGER.

See CRIMINAL LAW, 21.

MINES AND MINING.

Clay and Coal.—*Action for Damages for Sinking the Surface*.—*Negligence*.—*Conveyance*.—*Lessor and Lessee*.—The owner of the fee in certain lands, by written instrument, granted to A. "the sole right to dig, mine, use or sell clay situated on" such land "(except such clay as the "grantor "may dig for potter's use)"; and also the right to dig and mine coal on the same premises. He afterward, in like manner, granted to B., in the same lands, the right "to have, hold and possess all the coal, iron, lead and all other productions," vegetable and mineral, "under the surface, except the clay and stone heretofore let to" A. The assignee of the latter, in mining immediately underneath a mine operated by an assignee of the former, failed to leave sufficient supports to the ground above him, which settled down and thus destroyed the upper mine.

Held, in an action by the owner of the upper mine, against the owner of the lower, that the latter is liable for the damages sustained by the plaintiff, and that proof of the defendant's failure to leave sufficient supports to the ground overhead sustains the allegation of negligence, charged in the complaint. *Yardley v. Wright*, 319

MISCONDUCT OF JUROR.

See SUPREME COURT, 15.

MISTAKE.

See STATUTE OF FRAUDS.

1. *When will not be relieved Against*.—*Mortgage*.—*Sheriff's Sale*.—Where, in the execution of a mortgage, a mistake is made in the description of the land intended to be mortgaged, and such mortgage is afterward foreclosed and such mistake carried into the decree, order of sale, proceedings of the sheriff, his certificate, and the deed executed by such sheriff, to the assignee of such certificate, the latter is not entitled to have such mistake corrected as against persons who claim under an intermediate deed and mortgage executed by the same mortgagor. *Angle v. Speer*, 488
2. *Fraud*.—*Weight of Evidence*.—*Supreme Court*.—Where A. sells and delivers lumber to B., at a certain price per thousand feet, and the latter, upon measurement, deducts a part for splits, knots and defects, and A., not knowing of such deduction, accepts the note of B. for the amount of the lumber according to the measurement of the latter, which note is afterward paid, a suit may subsequently be brought upon the account, for the balance so deducted, and evidence may be introduced to correct the mistake made by B. in the measurement; and when this evidence has been passed upon by the court and jury below, the Supreme Court will not disturb the verdict and judgment upon the mere weight of such evidence. *Armstrong Furniture Co. v. Kosure*, 546

MITIGATION OF DAMAGES.

See NEGLIGENCE, 15.

MORTGAGE.

See FRAUD, 1; MISTAKE, 1; PLEADING, 1; PROMISSORY NOTE, 9; TURNPIKE, 6 to 8.

1. *Description of Premises.—Who may Object to Uncertainty.*—In an action against A., B. and C., on a promissory note executed by A. and B. to the plaintiff, and to foreclose a mortgage on real estate executed by B. and C. to the plaintiff, to secure the payment of such note, the complaint and mortgage described the mortgaged premises by metes and bounds in a certain section, etc., and as being "otherwise described as Lot No. 6 in said section."

Held, on demurrer by A., that, even if the description were void, he can not object thereto, but that the description is sufficiently certain against B. and C. *Reynolds v. Spencer*, 145

MURDER.

See CRIMINAL LAW, 2 to 7, 11 to 13, 21, 38 to 38; HABEAS CORPUS.

MUTILATION.

See EVIDENCE, 1.

NAME.

See APPEARANCE.

NEGLIGENCE.

See EXECUTION; INJUNCTION BOND; MINES AND MINING; PARTNERSHIP, 2; PRACTICE, 11; PROMISSORY NOTE, 8, 10, 11.

1. *Property Burned by Sparks from Locomotive.—Act contributing to Injury.—Answers to Interrogatories.*—In an action against a railroad company, by the owner of real estate lying contiguous to the defendant's track, to recover damages for the burning of a house situated on such real estate and of personal property contained therein, belonging to him, alleged to have been caused by sparks escaping from the smoke-stack of a locomotive used by the defendant, which was not provided with a sufficient spark arrester, the jury, with their general verdict for the plaintiff, found specially, that the plaintiff's house was set on fire by sparks emitted from the smoke-stack of a locomotive which was provided with an improper, defective and unsafe spark-arrester; that, if the locomotive had had a proper spark-arrester, the burning could not have occurred; that the sparks entered an unoccupied upper room of the house, through a window fronting on the track, left open by the plaintiff; and that, though the opening of the window contributed to the burning, yet, as the plaintiff did not know of the use or presence of the defective locomotive, he was not guilty of negligence in leaving the window open.

Held, that the defendant was not entitled to judgment *non obstante*.

L. N. A. & C. R. W. Co. v. Richardson, 43

2. *Same.—Instruction.—Jury to find as to Negligence.*—The evidence being conflicting, it was proper to instruct the jury trying such cause, that the court left it to them, "as a question of fact, whether there was negligence in the plaintiff, that invited or contributed to the injury complained of." *Ib.*
3. *Same.—Evidence.*—It was competent to enquire of a witness the exact date, after the fire, when such locomotive was taken to the shop to be repaired, to ascertain the correctness of a previous statement by him as to such date. *Ib.*
4. *Same.—Declarations of Plaintiff's Husband.*—Statements by the plaintiff's husband, as to the origin of the fire, were not competent evidence against the plaintiff, without proof of his agency. *Ib.*
5. *Complaint against Town for injuries resulting from a fall into Excavation in Street.—Notice.*—In an action against a town, to recover dam-

ages for an injury received by the plaintiff by a fall into an excavation in a sidewalk of a public street of said town, the complaint alleged that the defendant had "negligently permitted such excavation to be made;" that it was "so situated as to prevent pedestrians from passing along the said sidewalk * without turning out into" the street; that said excavation was upon a street "most used by the public, * and was by the defendant so negligently and carelessly allowed to remain, several days prior to said accident, without any proper or sufficient guards, lights, notices or railings * ; that, at the date of said accident, the plaintiff resided in said town, and was engaged in daily labor, by which she gained her support; * " that in the evening, about dark, she attempted to pass along said street, when, "without fault or negligence on her part, she fell into said excavation, and was thereby greatly injured, both externally and internally, disabled to labor, put to great expense," etc.

Held, on demurrer, that the complaint is sufficient.

Held, also, that the clear inference from the facts alleged is that the defendant had notice of the excavation, and of its condition, but that no such notice to the plaintiff can be inferred. *Town of Elkhart v. Ritter*, 136

6. *Same.—Answer.—Natural Causes Producing Excavation.*—The facts alleged in an answer in such action, that, during the making of a lawful excavation by a third person, the sidewalk had given away because of a "thaw," on the day of the accident, were admissible under the general denial, and therefore the sustaining of a demurrer to such answer was harmless. *Id.*
7. *Same.—Evidence.—Natural Consequences of Injury.*—The evidence on the trial of such action showing that the plaintiff had sprained a limb, and been injured internally, by such fall, and that, prior thereto, the officers of the defendant had actual notice of the dangerous condition of such excavation, the plaintiff had a right to give evidence of the effect upon her that actually and naturally followed the injury, as a consequence thereof. *Id.*
8. *Same.—Damages for Permanent Injury.*—The plaintiff in such action was entitled, on evidence that the injury was permanent, to recover for prospective as well as past damages. *Id.*
9. *Same.—Occupation of Injured Person.*—It was competent in such action for the plaintiff to give evidence of her occupation, and the effect of the injury as affecting her ability to continue in such occupation. *Id.*
10. *Same.—Declarations Indicating Pain.*—Complaints by the plaintiff, of pain caused by the injury, were also competent evidence. *Id.*
11. *Same.—Town Liable for Act of Third Person.*—It is the duty of a town to keep its public streets and alleys in a safe condition for ordinary use as such, and the fact that they are rendered unsafe by the act of a third person, without license from the town, is no defence to an action for an injury caused by such act. *Id.*
12. *Presumption.—Notice.*—A traveller using a public street in the ordinary manner, without knowledge that it is defective, has a right to presume that it is in safe condition; but if he have notice of the defect, and does not use ordinary care to avoid injury therefrom, the town is not liable. *Id.*
13. *Failure of Bank to give Notice of Non-Payment of Note Payable in Bank.*—When the proprietors of a bank are sued for failing to give notice of the dishonor of a note left with them for collection, and the material issue in the cause is as to whether due notice was given to the plaintiff of the dishonor of such note, a special verdict, which does not find that due notice was given, or facts from which the court can pass upon it as a question of law, is not sufficient to enable the court to

render judgment upon it, and a *venire facias de novo* should be granted.
Locke v. Merchant's Nat'l B'k, 353

14. *Same.—Exhibit.—Foundation of Action.*—In a suit by a banking corporation, against the proprietors of a private bank, to recover damages sustained by the former through the neglect of the latter to perform their duty in the collection of a note payable at the latter bank, the note is not the foundation of the action, and a copy thereof attached to the complaint as an exhibit forms no part of the complaint. *Ib.*
15. *Same.—Plea in Bar.—Bankruptcy.—Mitigation of Damages.*—In such case, a paragraph of answer, admitting the deposit of the note for collection and a failure to protest the same, but alleging the subsequent bankruptcy of the maker of the note, a composition by him with his creditors, without receiving a discharge, and his then ownership of valuable property, constituted no bar to the plaintiff's cause of action; and the facts alleged were available, if at all, only in mitigation of damages. *Ib.*
16. *Same.—Existence of Bank put in Issue.*—An answer of general denial in such case puts in issue the existence of the bank mentioned in the note. *Ib.*
17. *Action by Servant against Co-Servant.*—A servant is liable to a co-servant in damages, for a physical injury resulting to the latter by means of the negligence of the former, in the performance of labor for a common master. *Hinds v. Overacker*, 547

NEW TRIAL.

See CRIMINAL LAW, 25; FORCIBLE ENTRY, 1; PRACTICE, 16; SPECIAL FINDING, 2; SUPREME COURT, 3, 5, 9, 15.

1. *Agreed Case.*—A motion for a new trial is unnecessary in an action tried under section 386 of the practice act, on an agreed statement of facts.
The State, ex rel., v. Board of Comm'rs, etc., 216
2. *Practice.—Assignment of Error.—Instructions.*—Error in giving or refusing instructions, and "error of the court on the trial," are grounds for a new trial, but can not be assigned in the Supreme Court, as error.
Taylor v. Shelkett, 297
3. *Same.*—"Error of law occurring at the trial," assigned in that manner as ground for a new trial, is too vague and indefinite to present any question. *Ib.*

NEWLY-DISCOVERED EVIDENCE.

See SUPREME COURT, 3.

NOTICE.

See BOUNTY, 4, 5; COUNTY, 1; CRIMINAL LAW, 15, 18; NEGLIGENCE, 5, 12, 13; PARTITION, 5; PRINCIPAL AND AGENT; PROMISSORY NOTE, 9; TURNPIKE, 5.

OBSTRUCTING HIGHWAY.

See CRIMINAL LAW, 10, 43.

OFFICER.

See REPLEVIN, 1, 2.

PARENT AND CHILD.

See SEDUCTION.

PARTIES

See COMMON SCHOOLS, 1; MALPRACTICE; SUPREME COURT, 11; SURETY OF PEACE.

PARTITION.

See SHERIFF'S SALE, 6 to 9.

1. *Complaint.—Review of Judgment.—Blank.*—A petition for partition alleged, that on the —day of —, —, a certain person died intestate,

seized in fee simple of a tract of land particularly described, leaving the petitioner and certain of the defendants named, his children, and the remaining defendant named, his widow, surviving him, and averring that the children were equal owners thereof, subject to an alleged life-estate in one-third, in the widow.

Held, on demurrer to a complaint to review the judgment and proceedings in such partition suit, that the petition for partition was sufficient.

McCarthy v. McCarthy, 128

2. *Failure of Guardian ad Litem to Answer.*—The fact that a guardian *ad litem*, appointed in such partition proceeding, for an infant defendant, failed to file any answer as such, is not ground for review by an adult defendant. *Id.*
3. *Appearance.—Process.—Waiver.*—Where an adult defendant, on the sheriff's return of served "by copy," was defaulted, an appearance by such defendant to object to the report of sale of the lands in question, without a subsequent withdrawal of such appearance, amounted to an appearance in full to the action, and was a waiver of proper service. *Id.*
4. *Interlocutory Order of Partition.*—An interlocutory order appointing commissioners to make partition, without any particular finding that partition should be made, though informal, was sufficient. *Id.*
5. *Same.—Appraisal.—Notice of Sale.—Waiver.*—A statement in the commissioner's report of sale, that the sum for which the land was sold exceeded two-thirds of its appraised value, justifies the inference that the land had been properly appraised, and, no objection having been made on that ground, or on the ground that too much time had elapsed between the notice of sale and the sale, those irregularities were waived. *Id.*

PARTNERSHIP.

1. *Partial Answer to whole Complaint.—Promissory Note.—Common Count.—Harmless Ruling on Demurrer.*—In an action by the payee, against a copartnership alleged to be composed of A. and others, as maker and debtor, on two promissory notes and an account, in separate paragraphs, A.'s codefendants separately and jointly answered under oath, to the whole complaint, alleging that such copartnership was composed solely of A. and a certain incorporated company, and that they, such codefendants, were not liable on the "note."

Held, on demurrer, that the answer, being pleaded to the whole complaint, though answering only part thereof, is insufficient.

Held, also, a verified general denial being in, that the facts alleged in the special answer were admissible in evidence under the general denial, and, therefore, that the sustaining of the demurrer was harmless.

Root v. Hibben, 247

2. *Set-off.—Promissory Note.—Fraud.—Negligence.*—In a suit upon a promissory note not payable in bank, the defendant answered that himself, B. and C. were partners; that B. and defendant bought out C.'s interest in the concern, each to pay one-half of the amount agreed upon; that the note in suit was executed by defendant to C., in discharge of his half; that when C. retired from the firm he was indebted to it in a certain sum, on his individual account, which indebtedness C. had fraudulently concealed from defendant; that defendant subsequently bought out B. and became thereby the owner of the entire claim against C. and asked that such claim be allowed as a set-off against the note.

Held, that such claim does not constitute a set off. When a partner sells his "interest in the concern," it must be presumed that he sells only his legal interest in the firm; and it can not be assumed, in the absence of any stipulation to that effect, that such partner sold or intended to sell his indebtedness to the firm.

Held, also, that, when a party relies upon fraud as a ground for relief, facts showing the fraud must be alleged.

Held, also, that it will be assumed that C.'s indebtedness to the firm appeared upon its books, and that such books were open to the examination of the defendant, and his alleged ignorance of the existence of such indebtedness was the result of his own inexcusable negligence.

Over v. Hetherington, 365

PAYMENT.

See BOUNTY, 4; COUNTY AUDITOR, 2, 3; PRINCIPAL AND AGENT.

1. *Admission of Record.—Evidence.—Presumption.*—An admission, in a complaint to recover for goods sold and delivered, that a specified amount has been paid, is conclusive upon the plaintiff, and, in the absence of evidence to the contrary, is presumed to have been made on the date of the sale. *Frazer v. Boss*, 1
2. *Principal and Agent.—Harmless Ruling on Demurrer.*—Where there is an answer of payment generally, as well as an answer of payment to a particular third person, alleged to have been authorized to receive it, the facts alleged in the latter are admissible under the former, and therefore the overruling of a demurrer to the latter is harmless. *Kimmel v. Commons*, 35

PLEADING.

See BASTARDY, 3, 5, 6; CITIES AND TOWNS, 2 to 4; COMMON SCHOOLS, 1; CONTRACT, 1, 4; CONVERSION; DITCHES AND DRAINS, 1, 3, 4, 5, 7; EXECUTION, 5, 6; INJUNCTION BOND; MALICIOUS PROSECUTION, 2, 3; MALPRACTICE; NEGLIGENCE, 5, 6, 14, 16; PARTITION, 1; PARTNERSHIP; PAYMENT; PRACTICE, 2, 9, 11 to 14; PROMISSORY NOTE, 13, 14, 15, 19; SLANDER; SUBSTITUTED PLEADING; SUPREME COURT, 16; TURNPIKE, 5 to 8; WAIVER.

1. *Promissory Note.—Endorsement of.—Surplusage.—Indemnity Mortgage.—Record.*—In an action on a promissory note, and to foreclose a mortgage, the complaint counted on a mortgage executed by the defendant to A., to indemnify A. against loss as endorser of a promissory note, and all renewals thereof, executed by the defendant to A. The complaint alleged that the note in suit was a renewal of the note described in the mortgage, and that A., by the title of A., "Guardian," etc., had endorsed the same to the plaintiff, and that it remained due and unpaid.

Held, on demurrer, that the additional title in such endorsement was surplusage, that no separate question is presented by the record as to the mortgage, and, the defendant being personally liable on the note, that the complaint is sufficient. *Doherty v. Farnsley*, 133

2. *Copy of Instrument sued on.—Judgment on Complaint containing Good and Bad Paragraphs.—Supreme Court.*—One paragraph of a complaint counted upon a written agreement alleged to have been executed by the defendant and a debtor, agreeing to pay a debt due from the latter to the plaintiff; but the paragraph, though purporting to, did not, contain a copy of the agreement.

Held, on demurrer, that the paragraph is insufficient.

Held, also, the record not showing upon which paragraph judgment was rendered against the defendant, that the judgment can not be upheld.

Cook v. Hopkins, 208

3. *Contract.—When Presumed to be Verbal.*—Where the contrary is not alleged in the complaint in an action on a contract, it is conclusively presumed that the contract was merely verbal. *Goodrich v. Johnson*, 258
4. *Amendment.—Harmless Ruling.*—Where, after the sustaining of a demurrer to a pleading, other pleadings are filed, under which the evidence admissible under the former is properly given, the ruling on such demurrer is harmless. *Hadley v. State, ex rel.*, 271
5. *Harmless Error.*—It is a harmless error to sustain a demurrer to a

paragraph of answer, when the facts alleged therein could be and were given in evidence under other paragraphs of such answer.

Locke v. Merchants Nat'l Bk, 358

6. *Practice.—Common Law.—Demurrer.—Motion.*—Where the defects in a complaint are such as, at common law, could have been reached only by special demurrer, they can be reached, under the code, only by motion, and such complaint is good on demurrer. *Ib.*
7. *Same.—Uncertainty.—Blank Dates.*—Where a pleading is blank as to material dates, objection must be made by motion to make certain, and not by demurrer. *Baugh v. Boles*, 376; *Dean v. Miller*, 440
8. *Harmless Error.—Withdrawal of Pleading.*—It is a harmless error to sustain a demurrer to a paragraph of answer, when the matter of that paragraph can be given in evidence under the general denial, which is also pleaded; and the subsequent withdrawal of the general denial can not make the ruling materially erroneous. *Reeder v. Maranda*, 485
9. *Defective Complaint Cured by Verdict.*—Under section 580 of the practice act, many defects in a pleading are cured by verdict. *Wiles v. Lambert*, 494
10. *Same.—Defects in Complaint Aided by Answer.*—In an action to enjoin the sale of land on execution, an insufficient description, in the complaint, of the judgment on which the execution was issued, is cured by an accurate description thereof in the answer. *Ib.*
11. *Harmless Error.*—When the facts stated in a paragraph of answer may be given in evidence under the general denial, which is pleaded, it is a harmless error to sustain a demurrer to such paragraph. *Proctor v. Cole*, 576

POSSESSION.

See STATE PRISON NORTH, 4.

PRACTICE.

See ATTORNEY, 1; BILL OF EXCEPTIONS; COMMON SCHOOLS, 1; DEMURRER TO EVIDENCE; DEPOSITION; DITCHES AND DRAINS, 3; GUARDIAN AND WARD, 2; JUDGMENT; MALICIOUS PROSECUTION, 3; MALPRACTICE; NEW TRIAL; PLEADING, 6 to 8; PROMISSORY NOTE, 1, 13; SUPREME COURT.

1. *Answers to Interrogatories.—Verdict* —Where answers to interrogatories are not inconsistent with the general verdict, judgment *non obstante* can not be rendered. *Frazier v. Boss*, 1
2. *Same.—Answers Consistent with Complaint.*—Where there is a general verdict for the plaintiff, accompanied by answers to interrogatories, a motion by the defendant for judgment *non obstante* on specified paragraphs of the complaint should be overruled, if the answers be not inconsistent with the plaintiff's right to recover on either of such paragraphs. *Ib.*
3. *Special Verdict.—Interrogatories to Jury.*—A special verdict of a jury is different from their finding upon particular questions of fact stated in writing. *Todd v. Fenton*, 25
4. *Same.*—A special verdict is never found by a jury when they return a general verdict. *Ib.*
5. *Same.*—A jury finds specially upon particular questions of fact stated in writing, only when they render a general verdict. *Ib.*
6. *Supreme Court.—Record.—Inconsistency between Verdict and Answers to Interrogatories.—Bill of Exceptions.*—The general verdict of a jury, interrogatories propounded to them, and their answers thereto form parts of the record without a bill of exceptions; and, therefore, any inconsistency between the verdict and answers presents itself upon the face of

- the record without being alleged in the motion for a judgment on the answers notwithstanding the verdict. *Salander v. Lockwood*, 285
7. *Same.—Case Overruled.*—A simple verbal motion for such judgment and an exception to the ruling thereon present that ruling to the Supreme Court, without a bill of exceptions. *Shaw v. The Merchants National Bank, etc.*, 60 Ind. 83, overruled. *Ib.*
 8. *Presumptions supporting Verdict.*—Where, in such case, the evidence is not in the record, the Supreme Court will indulge every possible presumption in favor of the general verdict. *Ib.*
 9. *Waiver, by Trial without Issue.—Judgment on Pleadings.*—Where a defendant goes to trial without an issue on his answer, he waives issue and is not entitled to a judgment on the pleadings for the want of a denial or avoidance of such matters. *Locke v. Merchants Nat'l B'k*, 353
 10. *Death Presumed from Absence.—Administrator.*—Absence of five years, without tidings, raises the presumption of death, and the appointment of an administrator is proper. See note *a*, 2 R. S. 1876, p. 498. *Baugh v. Boles*, 376
 11. *Negligence.—Complaint.—Motion to make Specific.*—In an action for damages resulting from alleged negligence, insufficiency of the averments of negligence can be reached by motion to make specific, but not by demurrer. *Barnett v. Leonard*, 422
 12. *Demurrer Waived.—Amendment.*—Where, after a demurrer has been overruled to a pleading, an additional paragraph is filed, containing the same averments, a failure to demur thereto renders the ruling on such demurrer harmless. *Wiles v. Lambert*, 494
 13. *Uncertainty in Pleading.—Demurrer.—Motion.*—Uncertainty in a pleading is reached, not by demurrer, but by motion to make certain. *Ib.*
 14. *Special Demurrer.*—Under the practice act, a motion to make certain takes the place of, but is somewhat broader than, a special demurrer at common law. *Ib.*
 15. *Evidence, how Introduced.—Error in Admission of, when Cured.—Discretion of Court.*—A party may introduce his evidence in the order he prefers, subject only to the discretion of the court trying the cause; and where evidence has been admitted, which, standing by itself, is erroneous, the error may be cured by the subsequent admission of evidence supplying the defect, and is not then available on appeal. *Burns v. Harris*, 536
 16. *Objection to Evidence.*—In order that a question may be saved in the record regarding the admission of evidence, the grounds of objection thereto must be pointed out at the time objection is made. *Whistler v. Teague*, 565

PRESUMPTION.

See ATTORNEY, 2; CITIES AND TOWNS, 3, 5; CRIMINAL LAW, 4, 6, 10, 36; FRAUDULENT CONVEYANCE, 2; NEGLIGENCE, 12; PAYMENT, 1; PLEADING, 8; PRACTICE, 8, 10; PROMISSORY NOTE, 9; SLANDER; SUPREME COURT, 7, 12.

PRINCIPAL AND AGENT.

See AGENCY; COUNTY, 1; PAYMENT, 2; SHERIFF'S SALE, 3.

Payment of Promissory Note to Servant of Agent, after Revocation of Agency.—Notice.—In an action by the payee, against the maker, on a promissory note, wherein payment was pleaded, the evidence established that the note had been executed by the defendant for the price of a chattel sold and delivered to him by an agent appointed by the plaintiff to sell such chattels and collect such notes; that such agency was subsequently revoked, and a new agent appointed, but the defendant had no notice thereof; that subsequently the defendant called at a place where

the former agent carried on his individual business, to pay off the note; and that, such agent being absent, his servant searched for the note, failed to find it, and, having gone and seen his employer, by direction of the latter received, and receipted to the defendant for, the amount of the note, in the name of his employer.

Held, that an instruction that such payment was invalid was erroneous.

Held, also, that such payment, if made in good faith and without notice of the revocation of such agency, was valid. *Ulrich v. McCormick*, 243

PRINCIPAL AND SURETY.

See AGENCY; BASTARDY, 2 to 5; COUNTY AUDITOR, 1; DECEDENTS' ESTATES, 8; ESTOPPEL; FRAUDULENT CONVEYANCE, 2; INJUNCTION BOND; PROMISSORY NOTE, 4, 5.

PRIORITY.

See EXECUTION, 1.

PROCESS.

See PARTITION, 3; PROMISSORY NOTE, 9.

PROMISSORY NOTE.

See CHATTEL MORTGAGE, 1; CONTRACT, 2; CRIMINAL LAW, 26, 27; EVIDENCE, 1; FRAUD, 1; MORTGAGE; NEGLIGENCE, 13 to 16; PARTNERSHIP; PLEADING, 1; PRINCIPAL AND AGENT; TURNPIKE, 6 to 8.

1. *Non Est Factum*.—*Order of Introducing Evidence*.—In an action on a promissory note, by the payee, against the makers as principals, wherein one of the latter made default and the others answered *non est factum*, it was not error to allow the plaintiff to put the note in evidence before giving evidence of its execution. *Forgey v. First Nat'l Bk, etc.*, 123
2. *Expert*.—*Proof of Handwriting, by Comparison*.—The opinion of an expert, as to whether the signature attached to a note is genuine, formed by comparing the same with a signature which the maker admits to be his, is competent evidence to prove the execution of the note. *Ib.*
3. *Same*.—*Competency of Expert*.—*Weight of Evidence*.—The court trying a cause must determine the competency of a witness to testify as an expert, but it is for the jury to determine the weight of such evidence. *Ib.*
4. *Same*.—*Instruction to find for Codefendant*.—*Principal and Surety*.—An instruction to the jury trying such action, that the plaintiff had failed to make out a case against certain of the defendants, and directing a verdict for them, though erroneous, yet, if the relation of principal and surety be not shown by the record, it is an error which is not available to a codefendant against whom a verdict is found. *Ib.*
5. *Same*.—*Contribution*.—*Former Adjudication*.—Such defendant, if obliged to pay the judgment, can enforce contribution from such codefendants, if principals, in a subsequent action. *Ib.*
6. *Same*.—"Testimony" and "Evidence" Used Interchangeably.—Where, on such trial, the only written evidence was the promissory note, the use of the words "testimony" and "evidence" interchangeably, in an instruction as to the conflict of testimony, is harmless. *Ib.*
7. *Attorney's Fee*.—An unconditional stipulation in a promissory note, for the payment of an attorney's fee, is valid. *Garcer v. Pontious*, 191
8. *Non Est Factum*.—*Delivery*.—*Negligence*.—In an action by an endorsee, against the maker, on a promissory note payable in bank, wherein the execution of the note was duly put in issue, the jury found a general verdict for the plaintiff, and, in answer to interrogatories propounded by him, found that the defendant, being able to read, had negligently signed the note without reading it or having it read, and had impliedly delivered it, and that it was sold and endorsed to the plaintiff prior to the action. but that he had not used due diligence in purchasing it. They also found, in answer to interrogatories propounded by the defendant, that he had signed the note and laid it down, without knowing it to be a note; that,

while the defendant was in another room consulting his wife concerning the same, the agent of the payee took possession of it, and carried it away without the defendant's consent ; and that, upon his demand, the note was produced by the agent, and read and objected to by the defendant and not redelivered.

Held, on motion for judgment on the answers, the evidence not being in the record, that the general verdict implies that the note was in the custody of the payee as owner, and that the motion was properly overruled.

Salander v. Lockwood, 285

9. *Secured by Mortgage.—Action by Assignee of Payee—Defence by Assignee of Equitable Owner.—Attacking Judgment Collaterally.*—In an action by an assignee, against the maker, a purchaser of the equity of redemption, and a junior mortgagee, to collect several non-commercial promissory notes, and to foreclose a mortgage on real estate, executed by the maker to secure payment of the notes, all the defendants answered jointly, and the latter two filed a counter-claim, alleging that the husband of the payee, being the owner of the lands, was persuaded by the payee and her paramour to convey the same to her, without consideration ; that the payee and her husband conveyed the lands to the mortgagor, who executed to the payee the notes and mortgage in controversy, for the purchase-money ; that the payee and her paramour then eloped, taking with them the notes and mortgage ; that the husband thereupon, on due notice to the wife and the mortgagor, sued for and obtained, in the common pleas court, a decree of divorce, a judgment that the notes and mortgage were in equity his, and an injunction commanding her, and all claiming under her, to surrender the notes and mortgage to the husband, and forbidding the mortgagor from paying the same to her or her assigns ; that afterward the mortgagor and the purchaser of the equity of redemption had purchased of the husband the notes and mortgage in question, taking an assignment of the said decree as evidence of their ownership ; and that the plaintiff had purchased the notes subsequently, in bad faith, for an inadequate consideration, and with notice of the husband's rights and decree.

Held, on demurrer, that, regardless of whether or not the complaint for divorce was sufficient, the answer and counter-claim were sufficient.

Held, also, that the common pleas court had jurisdiction to render such decree, and that, as nothing to the contrary appears, notice to the defendants therein is presumed.

Held, also, that such decree could not be attacked collaterally.

Ayers v. Harshman, 291

10. *Payable in Bank.—Negligence.*—One, who, supposing that he is executing a simple article of agreement, executes a promissory note payable in bank, is guilty of negligence, and is liable thereon to a *bona fide* endorsee for value and before maturity, though given wholly without consideration.

Mazwell v. Morehart, 301

11. *Same.—Action by remote Endorsee after Maturity.—Fraud inadmissible in Evidence under Plea of non est factum.*—On the trial of an action by an endorsee of a promissory note payable in bank, wherein the defendant denied the execution of the note under oath, the evidence established that the defendant, intending merely to accept an appointment as an agent to sell a certain article, and having the ability to read, executed the note in suit, reading "Six months after date, or before if made out of" the sale of such article, etc., believing the same to read "Six months after date, if made out of the sale of" such article, as the same was read to him. The note showed endorsements by the payee and another in blank and not dated, but the endorsement to the plaintiff bore date after the maturity of the note.

Held, on demurrer by the plaintiff to the evidence, that he was entitled to recover.

Held, also, that mere fraud in the execution of the note was not admissible in evidence under the plea of *non est factum*. *Thomas v. Ruddell*, 326

12. *Same.—Abbreviation.—Evidence.*—A promissory note "payable at Citiz. Bank, Noblesville, Ind.," is a note payable at "Citizens Bank," etc., and if the jury might have so found upon it, such note was admissible in evidence in such case. *Locke v. Merchants Nat'l Bk*, 353

13. *Agency.—General and Special Verdict.—When Court may Assess Damages after Verdict.*—Where the facts set out in a complaint upon a promissory note amount, in legal effect, to an allegation that one of the defendant makers, acting by and through the other defendant maker, as his agent, executed the note in suit jointly with said agent, a general denial by the former of the complaint, not sworn to, only puts in issue the existence of the note; and an answer by the jury trying the case, to a special interrogatory, finding that the plaintiff had read in evidence a note purporting to be signed by both defendants, a copy of which had been filed with the complaint, is inconsistent with a general verdict in favor of the principal; and the plaintiff was entitled to have his damages assessed by the court, and to judgment for the amount thus found to be due upon the note. *Hall v. Harlow*, 448

14. *Substituted Complaint on.—Copy.—Arrest of Judgment.—Waiver by Failure to Demur.—Complaint Cured by Finding.*—In an action on a promissory note, wherein the defendant, without demurring, had joined issue on a substituted complaint, containing no copy of the note, he asked and was denied leave, after trial had commenced, to withdraw his answer and demur to such substituted complaint. His motion in arrest having been overruled, he appealed to the Supreme Court, there assigning as error the overruling of his motion in arrest, and also questioning the sufficiency of such complaint.

Held, the record showing that both the original and an amended complaint contained copies of the note, that the defendant, by failing to demur, had waived objection to the want of such copy in the substituted complaint, and therefore, as to that point, that such complaint was cured by the finding, and is sufficient. *Galvin v. Woolen*, 464

15. *Contract.—Counter-Claim.—Exchange of Chattels.*—In a suit upon a promissory note, a counter-claim was filed, alleging that the note in question was executed by the defendant for the difference between a sewing machine of a certain value which he had traded to the plaintiff, and a higher priced machine which he had obtained in said trade, and that the plaintiff, contrary to its agreement made at the time of such trade, had refused to repair said machine, which had proved worthless, or to give him another and a good one in its place.

Held, on motion in arrest, that the counter-claim is sufficient.

Howe Machine Co. v. Reber, 498

16. *Same.—Measure of Damages.—Fraud.—Warranty.*—In such case, the defendant would be entitled to recover only the actual damages sustained by the breach of the contract. Neither fraud nor warranty entered into the case. If he still retained the machine, and the same could be repaired so as to work according to contract, then the measure of his damages would be the cost of the repair, which he would be entitled to have deducted from the note; but if the plaintiff never refused to repair the machine, on request, or was never requested by the defendant to furnish a new one, the plaintiff would be entitled to recover on the note. *Ib.*

17. *Same.—Conditional Sale.—Departure in Instructions.*—An instruction to the jury trying such case, treating the alleged contract for the exchange of such chattels as a conditional sale, was a departure, and erroneous. *Ib.*

18. *Endorsement, Meaning of.*—The word "endorsement," as applied to a

promissory note, necessarily implies a writing on the back of the note.
Marion, etc., G. R. Co. v. Kessinger, 549

19. *Same.—Pleading.—Interest.*—Where, in a suit upon a promissory note, such note constitutes a cause of action against the defendant, independent of any additional agreement as to the rate of interest, endorsed thereon, a demurrer to the complaint for the want of facts will not reach any objection as to the sufficiency of the endorsement. *Ib.*
20. *Same.—Contract.—Fraud.*—Upon the completion of a contract for certain work, a promissory note was executed in settlement of the amount then found to be due, upon the representations of the payee that such work had been done properly, and six months later an agreement, by the maker, to pay an additional rate of interest from the date of such agreement was endorsed upon the note. In an action upon such note by the payee against the maker, the defendant answered alleging that such work was not done according to the terms of the contract, but not alleging that the defendant did not examine the work, or had no opportunity to examine it, or that there was any concealment on the part of the plaintiff as to the character of the work, or that the defendant was in any way deceived in regard to it, or was ignorant of it at the time of or before the execution of the note or at the time of the agreement to pay the additional interest.
Held, on demurrer, that the answer is insufficient. *Ib.*
21. *Same.—Admission of Endorsement in Evidence.—Practice.*—The sufficiency, validity and consideration of such endorsement, as alleged in such complaint, not being called in question either by the pleadings or evidence of the defendant, he could make no valid objection to its admission in evidence. *Ib.*

PROSTITUTE.

See CRIMINAL LAW, 28.

PUBLIC PLACE.

See CRIMINAL LAW, 1.

QUESTION OF LAW RESERVED.

See SUPREME COURT, 8.

RAILROAD.

See CONVEYANCE; NEGLIGENCE, 1.

RATIFICATION.

See COUNTY AUDITOR, 8; SHERIFF'S SALE, 8; SPECIFIC PERFORMANCE, 2.

REAL ESTATE, ACTION TO QUIET TITLE.

See FRAUDULENT CONVEYANCE, 1.

REAL ESTATE, ACTION TO RECOVER.

See FRAUDULENT CONVEYANCE, 1.

RECOGNIZANCE.

See BASTARDY, 2 to 5.

RECORD.

See BILL OF EXCEPTIONS; CRIMINAL LAW, 15, 81, 82; DEMURRER TO EVIDENCE, 2; GUARDIAN AND WARD, 2; INSTRUCTION, 1; JUDGMENT; PLEADING, 1; SUPREME COURT, 8, 9, 10.

RECORD OF INSTRUMENT.

See CHATTEL MORTGAGE, 1.

REDEMPTION.

See REPLEVIN, 2; SHERIFF'S SALE, 1.

REFORMING WRITING.

See STATUTE OF FRAUDS.

RELATOR.

See COMMON SCHOOLS, 1; COUNTY AUDITOR, 3; SURETY OF PEACE.

REMEDY.

See SHERIFF'S SALE, 8.

REMITTITUR.

See SUPREME COURT, 1, 2.

RENTS.

See SHERIFF'S SALE, 1.

REPEAL OF STATUTE.

See COUNTY AUDITOR, 3; MECHANIC'S LIEN, 2; TURNPIKE, 3, 7.

REPLEVIN.

See CHATTEL MORTGAGE.

1. *Answer.—Chattels levied on by Officer.*—In an action of replevin, the defendant answered that he was a constable, and as such had levied executions on the property in question "as the property of" an execution defendant, but there was no averment that the property belonged to such execution defendant, nor that it was subject to levy on such executions. *Held*, on demurrer, that the answer is bad. *Olds v. Andrews*, 147
2. *Chattel Mortgage.—Equity of Redemption subject to Execution.*—The equity of redemption of property covered by a chattel mortgage is subject to execution, and therefore the mortgagee can not replevy the same from an officer who, while they are in the possession of the mortgagor pursuant to the terms of the mortgage, has levied on them for sale on an execution against the mortgagor. *Id.*
3. *Husband Liable for Wife's Tort.*—The husband is liable, in an action of replevin, for the unlawful detention by his wife, under claim of title in herself, of the chattels of another. *Chosen v. Porter*, 194
4. *Same.—Act of 1879 Concerning Married Women.*—The act of March 25th, 1879, Acts 1879, p. 160, "concerning married woman," is not considered by the Supreme Court, in determining the liability of a husband for the tort of the wife, in an action tried prior to that time. *Id.*
5. *Disclaimer, no Ground for Dismissal.—Title in Third Person.*—Title in a third person is a good defence in replevin, but the defendant is not entitled, on his verified disclaimer of interest in the property, and allegation of title and possession in a third person, to a dismissal of the suit. *Id.*

RES ADJUDICATÆ.

See COVENANT.

See opinion, at length, on this subject.

Griffin v. Wallace, 410

RESCISSIION.

See CONTRACT, 1; FRAUD, 1.

REVERSION.

See CONVEYANCE.

REVIEW OF JUDGMENT.

See PARTITION.

REVIVING ACT.

See TURNPIKE, 3 to 5, 7.

REVOCATION.

See PRINCIPAL AND AGENT.

SALARY.

See STATE PRISON NORTH, 4.

SALE.

See CHATTEL MORTGAGE, 4; CONTRACT; EVIDENCE, 2; PROMISSORY NOTE, 17.

SCHOOL TRUSTEE.
See COMMON SCHOOLS.

SEDUCTION.

Action by Parent.—Measure of Damages.—In an action by a father, to recover damages for the seduction of his infant daughter, he is entitled to recover, if at all, as well for his wounded feelings and for the dishonor brought upon him, as for the loss of his daughter's services; and the amount of the damages is a question for the jury. *Taylor v. Shelkett*, 297

SERVICE OF EXECUTION.

See EXECUTION, 7.

SET-OFF.

See DECEDENTS' ESTATES, 2, 8; PARTNERSHIP, 2; STATUTE OF FRAUDS.

SETTLEMENT.

See CONTRACT, 2.

SHERIFF.

See COUNTY, 2; EXECUTION, 4 to 7.

SHERIFF'S SALE.

See MISTAKE, 1; PLEADING, 10.

1. *Action for Rents of Real Estate Sold.—Purchaser from Judgment Debtor not Liable.*—One who, under a conveyance from the judgment debtor, enters into possession of real estate sold at sheriff's sale, and retains possession until the expiration of the year for redemption, is not liable to either the purchaser or his assignee for the rents. *Wilson v. Powers*, 75
2. *Injunction of Sale on Vendi., after Death of Judgment Plaintiff.—Contract to Preserve Lien.—Widow.—Insolvency.*—In an action by the judgment defendant, against a sheriff and others, to enjoin the sale of personal goods seized on an execution issued on a judgment after the death and in the name of the judgment plaintiff, and without the appointment of any administrator or executor, the defendants answered that the judgment plaintiff had died intestate, and free from debt, leaving his widow as his only heir; that in his lifetime, after the issue of execution and a partial payment thereon, the judgment plaintiff had extended the time of payment on the agreement of the judgment defendant, that successive executions might remain in the hands of the sheriff, as a lien on the property; that, after his death, such agreement was continued between his widow and the judgment defendant, and partial payment was made by the latter to her, and delivery bonds executed by him as each execution issued; that he had become utterly insolvent, having no other property out of which the execution could be satisfied; that the execution complained of was a *vendi*, issued for the sale of such property; and that an administrator of the intestate has been appointed since the filing of the complaint. *Held*, on demurrer, that the answer is good. *Egbert v. Mercer*, 305
3. *Action to Vacate, and for Purchase-Money.—Sale to Wife on Husband's Bid.—False Representations by Sheriff.—Sale without Memorandum.—Ratification.*—In an action against the sheriff and judgment creditor, to vacate a sheriff's sale, and to recover money paid thereon, the complaint alleged that theretofore, in selling certain real estate on a decree of foreclosure in favor of his codefendant, the sheriff, on a bid made on behalf of the plaintiff by her husband, had sold the real estate to the plaintiff, without her knowledge or consent; that the husband had no authority to act as her agent; that no memorandum of the sale had been made; that afterward, in order to induce the plaintiff to ratify the sale, the sheriff had falsely represented to her that the premises sold included certain valuable improvements; and that the plaintiff, relying on such representations, agreed to accept the sale, and paid to the sheriff part of the purchase-money bid. *Held*, on demurrer, that the complaint is sufficient. *Case v. Colter*, 336

4. *Same.—Witness.*—Under the act of March 11th, 1867, 2 R. S. 1876, p. 132, "defining who shall be competent witnesses," etc., the plaintiff's husband was not a competent witness in her behalf, in such action. *Ib.*
5. *Same.—Defective Verdict.—Amendment of, by Court.—Damages.*—There being no contest in such action as to the amount paid by the plaintiff, and the jury having simply found a general verdict "for the plaintiff," it was proper for the court, on motion, to supply the defect in the verdict by assessing the damages at the amount so paid. *Ib.*
6. *Execution.—Sale of Lands on.—Inchoate Interest of Debtor's Wife Prior to Act of March 11th, 1875.*—Prior to the taking effect of the act of March 11th, 1875, 1 R. S. 1876, p. 554, when the lands of the debtor were sold on an execution issued on a simple personal judgment, the purchaser, on receiving his deed from the sheriff, took the fee-simple title in the whole subject only, so far as the wife of the debtor was concerned, to her inchoate interest in one-third thereof, which interest would become consummate in case she should survive her husband. *Taylor v. Stockwell*, 505
7. *Same.—Interest of Wife Under Act of 1875.—Partition.*—By the act of 1875, the one-third in which the wife of the debtor has an inchoate interest can not be sold on an execution issued on a judgment rendered subsequent to the taking effect of that act; and, upon a sale of the other two-thirds on such execution and the vesting of the title thereof in the purchaser, her hitherto inchoate interest becomes consummate, and she is entitled to immediate possession thereof and to have the same set off to her by partition. *Ib.*
8. *Same.—Remedy.—Contracts Prior to that Act.*—Such act affects only the remedy of the creditor, and that to a reasonable extent, and applies to judgments rendered on contracts made previous to, as well as to those made since, the taking effect of such statute. *Ib.*
9. *Same.—Constitutional Law.—Impairing Obligation of Contracts.*—Such statute is not in conflict with the provisions of the State and Federal constitutions, prohibiting the enactment of any statute impairing the obligation of contracts. *Ib.*

SLANDER.

Complaint.—Blank Dates.—Presumption of Jurisdiction.—Innuendo.—Damages.—In an action for slander, the complaint alleged "that, at a term of" a certain circuit court of this State, "begun and held at" the proper place, "on the — day of —," wherein was pending a prosecution of this defendant, by the State, "for keeping and maintaining a gambling house," the plaintiff, being duly sworn, testified as a witness, on the trial, "touching the guilt of the defendant, and material to the issue joined therein"; that afterwards the defendant, "wickedly intending," etc., "in the presence of," etc., did "falsely and maliciously speak, of and concerning the plaintiff and his said oath and testimony in said cause, as aforesaid, the following false and slanderous words, to wit: 'You' (the plaintiff meaning) 'swore to a lie,' " etc.; "whereby the defendant meant to charge, and was understood by those who then and there heard said conversation to charge, that the plaintiff had committed the crime of perjury."

Held, on demurrer, that, as the act abolishing the common pleas court and conferring its jurisdiction over misdemeanors on the circuit court had gone into effect prior to the commencement of this action, the presumption is that such prosecution was begun at a time when the circuit court had jurisdiction.

Held, also, that it is sufficiently alleged that the slanderous declarations by the defendant were made concerning the plaintiff's testimony.

Held, also, that the words laid charged the defendant with perjury, without an innuendo.

Held, also, that the law implies damages from the speaking of such words.
Dean v. Miller, 440

SOLDIER'S BOUNTY.

See BOUNTY.

SPECIAL DEMURRER.

See PLEADING, 6 ; PRACTICE, 14.

SPECIAL FINDING.

See COMMON SCHOOLS ; SPECIFIC PERFORMANCE ; VENDOR'S LIEN.

1. *Conclusion of Law.—Surplusage.*—The fact that one of several special findings of fact is merely a statement of a conclusion of law does not vitiate the other findings. *Anderson v. Donnell*, 150
2. *New Trial.—Venire de Novo.—Omission of Fact.*—A material omission, in a special finding, of some fact in issue, is ground not for a new trial, but for a *venire de novo*. *Schmitz v. Lauserty*, 29 Ind. 400, and *Crusan v. Smith*, 41 Ind. 288, overruled on this point. *Id.*
3. *Special Verdict.—What facts to be Found.—Venire de Novo.*—Under the statute of this State, only the facts which are proved upon the trial of a cause are to be found in the special verdict or stated in the special finding ; and if the facts proved and found leave some issues in the case undetermined, those issues must be regarded as not proved by the party having the burden of proof ; and in such case the special finding is not objectionable because it does not pass upon all of the issues, and affords no sufficient cause for a *venire de novo*. *Graham v. State, ex rel.*, 386
4. *Same.—Supreme Court.*—Where the evidence is not in the record, the Supreme Court will presume that all the facts proved on the trial were found by the court in its special finding. *Id.*

SPECIAL VERDICT.

See PRACTICE, 8 to 5 ; PROMISSORY NOTE, 13 ; SPECIAL FINDING, 8.

Venire de Novo.—The facts involved in the finding of a special verdict are evidentiary and inferential. It is the duty of the jury to consider the evidentiary facts, but to find the inferential facts ; and if the special verdict shows upon its face that the jury found the evidentiary facts, but not the inferential, the verdict is ill, because it shows that the jury ought to have found other facts, namely, the inferential. The jury should not find the evidence but the facts, that is, the inferential facts.

Locke v. Merchants Nat'l B'k, 353

SPECIFIC PERFORMANCE.

1. *Contract to convey Land.—Action against Widow and Heirs.—Evidence. Declarations of Husband.—Agency.*—In an action against the widow and heirs of a decedent, to enforce specific performance of an alleged parol contract between the plaintiff and decedent, in the lifetime of the latter, for the conveyance of a tract of land sold by the decedent to the plaintiff, the latter proved an agreement between the plaintiff and the husband of one of the heirs, as to the location of a corner of such land, made during a survey thereof.
Held, that, though the husband was a nominal defendant, his agreement, without proof of his agency, binds neither his wife nor the other defendants. *Long v. Brown*, 160
2. *Wife's Contract to Convey Void.—Ratification.*—A wife's agreement to join with her husband in conveying his land, pursuant to a contract of sale, is void, and can not be ratified by or enforced against her, on the death of her husband. *Id.*
3. *Verbal Contract.—Tender.—Answers to Interrogatories.—Instructions to Jury.*—In an action by the vendee, against the vendor, his wife, and a subsequent purchaser from such vendor, to enforce specific performance of an alleged verbal contract for the sale and conveyance of certain

real estate, the complaint alleged the making of the contract, partial payment of the purchase-money, delivery to the plaintiff of immediate possession, the making of valuable and lasting improvements, tender of a certain sum as the residue of the purchase-money with interest, demand and refusal of a conveyance, and subsequent conveyance by the vendor and his wife to their codefendant, who purchased with knowledge of the plaintiff's rights. The jury, with their general verdict for the plaintiff, found specially that there was due of the purchase-money, to the vendor, from the plaintiff, *at the date of the trial*, a certain sum of money exceeding the amount of the alleged tender.

Held, on appeal, in which the subsequent purchaser formally declined to join, that the special finding does not conflict with the general verdict, nor with the allegation of a tender.

Held, also, that the appellants can not complain of instructions to the jury affecting the interests of their codefendant only. *Higbee v. Moore*, 263

STATE PRISON NORTH.

1. *Election and Term of Office of Directors.*—Section 1 of the act of March 5th, 1869, 1 G. & H. 470, providing "for the erection of a new prison north of the national road, election of officers therefor, * * and for the regulation of the same," provides for the election, by a joint vote of the General Assembly, of three directors of that prison, and that they shall hold their offices "for the term of two years, and until their successors are elected and qualified." *Manson v. State, ex rel.*, 78
2. *Same.—Statute Construed.*—Section 13 of such act has no reference to the election and terms of office of such directors, but simply continues in force the laws and regulations governing the state prison south, so far as the same concerned the warden, clerk and other appointees authorized by law. *Ib.*
3. *Same.*—The directors of the state prison north, elected by the General Assembly of 1877, were entitled to hold their offices until the 11th day of March, 1879, at which time the directors of that prison, previously elected by the General Assembly of 1879, were entitled to succeed the former. *Ib.*
4. *Same.—Right to Salary by one not in Possession.—Waiver.—Mandate.—Auditor of State.*—In an action on the relation of a member of such new board, against the auditor of state, to compel him, by mandate, to issue a warrant to the former for his salary, wherein the members of the old board, being admitted as defendants on their own petition, claimed to be the legal directors, the question as to whether the plaintiff's relator could maintain the action, while not in possession of the office, could only be raised, and could be waived, by the auditor of state. *Ib.*

STATUTE CONSTRUED.

See CITIES AND TOWNS, 1, 4; FEES AND SALARIES; STATE PRISON NORTH, 2.

STATUTE OF FRAUDS.

See BASTARDY, 6; SHERIFF'S SALE, 3.

Memorandum, Reformation of.—Parol Evidence of Mistake Inadmissible.—Set-Off.—In a suit upon account, for goods sold and delivered, an answer was filed alleging that the plaintiffs, H. Bros., by their agent, E. F. L., executed and delivered a written memorandum of goods they agreed to deliver to the defendants, A. P. L. & Bro., of which the following is a copy: "Terre Haute, Ind., —, 187-, A. P. L. & Bro." (Under this caption a list of the articles, with their specific and aggregate price, is given.) "Freight. Ship Emp. Line, 60 days' acceptance. [Signed,] H. Bros., per E. F. L., April 21st, 1875;" that said goods were not delivered to the defendants, by reason whereof they had been damaged in a certain sum; that said memorandum was written on a bill-head of the defendants, and by mistake the word

"sold" was omitted from before the firm name of defendants. Prayer for a reformation of the memorandum, an offer to set off an amount of the damages equal to the plaintiffs' claim, and a demand for judgment for the residue.

Held, that the contract is within the statute of frauds, and that the memorandum is not a "note or memorandum in writing of the bargain," within the meaning of the statute.

Held, also, that parol evidence was not admissible to supply the omitted word in the memorandum. *Lee v. Hills*, 474

STATUTE OF LIMITATIONS.

See BOUNTY, 8; FRAUDULENT CONVEYANCE, 3.

1. *Extension of Limitation, on Death of Party, under Section 217.*—The limitation of six years, prescribed by section 210 of the code as the period within which actions on account must be brought, is not shortened by section 217 of the code, prescribing that, upon the death of either party to a contract not then barred, the action survives to or against the representative of the decedent, and must be brought within eighteen months after his decease. *Harris v. Rice*, 287
2. *Same.*—In case of the death of either party less than eighteen months preceding the expiration of the limitation fixed, the effect of section 217 of the code is such as to extend the statutory limitation for a period equal to the difference between eighteen months and the residue of the limitation unexpired at the death of such party. *Id.*

STOCKHOLDER.

See DRAINING ASSOCIATION.

STREET.

See CITIES AND TOWNS, 2 to 6; NEGLIGENCE, 5 to 12.

SUBSTITUTED PLEADING.

See PROMISSORY NOTE, 14.

SUPREME COURT.

- See APPEAL; BILL OF EXCEPTIONS, 3; BILL OF PARTICULARS; CRIMINAL LAW, 14, 15, 18, 31; DEMURRER TO EVIDENCE, 2; FORCIBLE ENTRY; GUARDIAN AND WARD, 2; INSTRUCTION; MISTAKE, 2; NEW TRIAL; PLEADING, 2; PRACTICE, 6 to 8; REPLEVIN, 4; SPECIAL FINDING, 4.
1. *Remittitur of Part of Judgment.—Practice.*—Where, from the evidence and findings of the jury, the true amount that a party is entitled to recover can be ascertained by the Supreme Court, the judgment may be affirmed as to that amount, on condition of a remittitur of the residue. *Frazer v. Boss*, 1
 2. *Same.—Erroneous Instruction as to Interest.*—This rule may be applied notwithstanding an erroneous instruction by the lower court solely as to the time when interest should begin to run on the principal. *Id.*
 3. *Record.—Affidavit.—Newly-Discovered Evidence.—New Trial.—Bill of Exceptions.—Practice.*—Affidavits in support of a motion for a new trial, on the ground of newly-discovered evidence, form no part of the record on appeal to the Supreme Court, unless embodied in a bill of exceptions. *Fryberger v. Perkins*, 19
 4. *Same.—Evidence.*—No question is presented to the Supreme Court on the overruling of such motion, where the evidence given on the trial of the cause is not in the record. *Id.*
 5. *New Trial.—Evidence.*—The Supreme Court will not grant a new trial merely because of the weakness of evidence tending to support the verdict. *York v. Webster*, 50
 6. *Verdict.—Tort.—Excessive Damages.—Rule.*—The Supreme Court will not disturb the verdict of a jury assessing damages for a tort, on the ground of "excessive damages," unless the amount assessed appears, "at

- first blush, to be outrageous and excessive," or where some improper element entered into the consideration of the jury, in assessing the damages.
Town of Westerville v. Freeman, 265
7. *Presumption.—Instructions when Evidence is not in Record.*—Where, on appeal to the Supreme Court, the evidence is not, and the instructions are, in the record, and, under the issues, evidence could have been given to which the instructions would be applicable, it is presumed that such evidence was given.
Higbee v. Moore, 263
 8. *Question of Law Reserved.—Assignment of Error.—Dismissal.*—Without an assignment of error, as in other cases, an appeal to the Supreme Court on a question of law reserved will be dismissed.
Elder v. Sidwell, 816
 9. *Exception to Rejection of Evidence.—Motion for New Trial.*—The fact that an exception was reserved to the rejection of evidence offered must be made to appear by the record; a mere allegation in the motion for a new trial, that such exception was reserved, not being sufficient.
Conrad v. Wilson, 487
 10. *Defective Record.*—Where it appears that the evidence is not in the record, and that no exception was reserved to any thing occurring at the trial, no question can be made in the Supreme Court, upon the general verdict.
Hall v. Harlowe, 448
 11. *Defect of Parties.—Practice.*—A point as to a defect of parties defendants can not be made for the first time in the Supreme Court.
Reeder v. Maranda, 485
 12. *Presumption Sustaining Instruction.*—Where, on appeal to the Supreme Court, the evidence is not in the record, but, under the issues, evidence might have been given to which the instructions would have been applicable, the presumption is that such evidence was given.
Wiles v. Lambert, 494
 13. *Appeal for Delay.—Damages.*—A failure by the appellant, on appeal from a judgment against him for the payment of money, to present any argument in his brief in support of any of the errors assigned by him, justifies the affirmance of the judgment, with damages added.
Kramer v. Warth, 548
 14. *Excessive Damages.*—Where the evidence is conflicting, the Supreme Court will not disturb the verdict, even though the damages assessed seem too large.
Whistler v. Teague, 565
 15. *New Trial.—Affidavits.—Misconduct of Juror.*—Affidavits in support of and against a motion for a new trial on the ground of the misconduct of a juror may be allowed by the circuit court; and the Supreme Court will not disturb the decision of the court below upon any other principle than that upon which it will disturb the verdict of a jury for the want of sufficient evidence to support it.
Id.
 16. *Withdrawal of Appearance.—Default.—Pleading.—Practice.*—The facts that a demurrer by the defendant to the complaint is overruled, and that he then withdraws his appearance and makes default, without reserving any exception to the decision upon the demurrer, do not estop him from questioning the sufficiency of the complaint in the Supreme Court, where the case stands as if no demurrer had been filed.
Terrell v. State, ex rel., 570

SURETY OF PEACE.

1. *Where Defendant should be Recognized to Appear.—Jurisdiction.*—Where, in a proceeding before a justice of the peace to obtain surety of the peace, the justice finds against the defendant, the latter should be recognized to appear in the criminal circuit court of such county, if there be such a court therein; otherwise in the civil circuit court. *State v. Carey*, 72

2. *Relator.—Parties.*—A proceeding to obtain surety of the peace should be instituted in the name of the State, without any relator. *Ib.*

SURPLUSAGE.

See PLEADING, 1; SPECIAL FINDING, 1.

TENDER.

See SPECIFIC PERFORMANCE, 3.

TIME.

See BASTARDY, 1; BILL OF EXCEPTIONS, 1, 4; CRIMINAL LAW, 14, 15.

TREASURER.

See COMMON SCHOOLS; COUNTY TREASURER.

TITLE TO LAND.

See FORCIBLE ENTRY.

TORT.

See REPLEVIN, 8; SUPREME COURT, 6.

TRIAL.

See HIGHWAY, 2.

TURNPIKE.

1. *Minimum Width of.*—Under the first specification of section 1 of the act of June 9th, 1862, 1 R. S. 1876, p. 664, "to amend acts of incorporation for the construction of plank roads and turnpike roads," the minimum width of a turnpike consisting of a single track is eight and one-half feet. *Neff v. Mooresville, etc., G. R. Co., 279*
2. *Same.—Gravel Road.*—The words "turnpike roads," as used in that act, include gravel roads. *Ib.*
3. *Gravel Road Assessments.—Repealing Act of 1875.—Effect of Reviving Act of 1877.*—By the act of March 18th, 1875, Acts 1875, Reg. Sess., p. 80, all laws authorizing an assessment, or the collection thereof, for plank, macadamized or gravel road purposes in this State were repealed, and therefore assessments theretofore made under any previous act could not be collected while that act remained in force; but by the act of March 2d, 1877, Acts 1877, Reg. Sess., p. 72, the act of 1875 was modified to the extent that valid assessments, which had been made and placed upon the tax duplicate prior to March 18th, 1875, under the provisions of the act of May 14th, 1869, Acts 1869, Spec. Sess., p. 73, were authorized to be collected, in cases where the corporations had contracted debts on the faith of the assessments; and for that purpose, and to that extent only, said act of 1869 was revived. *Marion, etc., G. R. Co. v. McClure, 468*
4. *Same.—Curative Act.*—Said act of 1877 was not intended to act as a curative statute, and does not authorize the collection of assessments which were void for non-compliance with the statute under which they were made. *Ib.*
5. *Same.—Injunction.—Estoppel.—Pleading.—Notice.*—In a suit to enjoin the collection of certain void gravel road assessments, made more than two years prior to the passage of said act of 1875, an answer was filed setting up, by way of estoppel, that such assessments had been upon the tax duplicate for more than two years prior to the passage of said act of 1875, and that the plaintiffs, during that time, had instituted no proceedings to contest their validity, but had stood by and seen the defendant, during said time, perform work and contract debts upon the faith of such assessments, but it did not allege that the plaintiffs, during said time, had any notice of the facts rendering such assessments void. *Held, on demurrer, that the answer is insufficient. Ib.*
6. *Mortgage, Foreclosure of.—Conveyance.—Breach of Warranty.—Gravel Road Tax.—Lien.*—In a suit to foreclose a mortgage and for judgment upon a note secured thereby and given for part of the purchase-money of the real estate covered by said mortgage, a paragraph of answer by

the defendant, setting up a breach of a covenant of warranty in the deed conveying such real estate to him, by reason of the alleged lien of a gravel road tax on the premises, and asking that the amount of such tax be deducted from the note, but not alleging that he had paid such tax or been in any way damaged, and not alleging facts showing such tax to be a valid and binding lien upon the property under the existing statutes upon the subject of such taxes, is insufficient. *Cook v. Fuson*, 521

7. *Same.*—*Repealing Act of 1875.*—*Reviving Act of 1877.*—Where such conveyance was made after the enactment of 1875, repealing all gravel road laws, but the cause was tried after the enactment of 1877, reviving certain gravel road assessments, such an answer should aver facts showing that the assessment complained of comes within the latter statute. *Id.*
8. *Same.*—*Parol Agreement for Extension of Time of Payment.*—In such case, a second paragraph of answer setting up, in abatement of the action, a parol agreement, made after the execution of said note and mortgage, for an extension of the time of payment of the same, upon the promise of the defendant to pay such tax, but not showing that such tax was a valid lien upon the real estate, and not averring on the part of the defendant either performance of, or a willingness to perform, such parol agreement, is insufficient. *Id.*

ULTRA VIRES.

See COUNTY, 1.

UNCERTAINTY.

See COMMON SCHOOLS, 1; CONVERSION; INTERROGATORIES; MORTGAGE; PARTITION, 1; PLEADING, 7; PRACTICE, 13, 14; SLANDER.

USER.

See CRIMINAL LAW, 10.

VAGRANCY ACT.

See CRIMINAL LAW, 28.

VARIANCE.

See CITIES AND TOWNS, 5; CRIMINAL LAW, 24, 26.

VENDOR AND PURCHASER.

See FRAUD.

VENDOR'S LIEN.

Lien can not be, for Broker's Commission, or for Money advanced by him.—*Rule as to Vendor's Lien.*—*Special Finding.*—In an action by A., against C., the holder of the title to certain real estate, and D., the holder of a mortgage thereon, to enforce a vendor's lien, the court found specially, that, at a certain date, C.'s grantor, being then the owner of said real estate, agreed with A. and B. verbally, to accept a certain price for the land; that subsequently A. and B. effected a sale of the land to C. for a sum exceeding the price above named; that thereupon C.'s grantor executed to C. a conveyance for the land, receiving promissory notes for the price so fixed, executed by A., B. and C., and a mortgage executed by C., on the land, to secure payment of the notes, it being agreed that the residue of the purchase-money should be received equally by A. and B.; that B. subsequently received his share of that residue from C., who also paid off the notes held by his grantor; that A., to enable C. to pay the same to his grantor, loaned to him a certain sum of money, taking from him his promissory notes for the gross amount of such loan and A.'s share in said residue of purchase-money; that C. had paid off the note and mortgage held by his grantor; and that D.'s mortgage was subsequently executed for borrowed money.

Held, that in no event could A. have enforced a lien for the amount of his note against C.

Held, also, that a plaintiff's right to enforce a vendor's lien must be decided upon the facts of his particular case. *Anderson v. Donnell*, 150

VENIRE DE NOVO.

See NEGLIGENCE, 18; SPECIAL FINDING, 2, 3; SPECIAL VERDICT.

VENUE, CHANGE OF.

See CRIMINAL LAW, 29, 30.

VERDICT.

See CONTRACT, 1; HABEAS CORPUS; PLEADING, 9; PRACTICE, 1 to 8; PROMISSORY NOTE, 13; SHERIFF'S SALE, 5; SPECIAL FINDING, 3; SPECIAL VERDICT; SUPREME COURT, 6.

VESTED RIGHT.

See CRIMINAL LAW, 44.

VIEWS.

See DITCHES AND DRAINS, 2.

VINCENNES UNIVERSITY LOTTERY.

See CRIMINAL LAW, 44.

VOLUNTARY SERVICES.

See BOUNTY, 5.

WAIVER.

See APPEARANCE; CRIMINAL LAW, 18, 25; DECEDENTS' ESTATES, 1; PARTITION, 3, 5; PRACTICE, 9, 12; PROMISSORY NOTE, 14; STATE PRISON NORTH, 4.

Pleading.—Jurisdiction.—The doctrine of waiver, as applicable to questions ordinarily arising during the progress of a cause, does not apply to questions of jurisdiction over the subject-matter of the action, nor to the sufficiency of the facts set up in the complaint.

Terrell v. State, ex rel., 570

WARRANTY.

See COVENANT; PROMISSORY NOTE, 16; TURNPIKE, 6.

WEIGHT OF EVIDENCE.

See CRIMINAL LAW, 7, 9, 39; MISTAKE, 2; PROMISSORY NOTE, 8; SUPREME COURT, 15.

WIDOW.

See SHERIFF'S SALE, 2; SPECIFIC PERFORMANCE, 1; WILL, 4.

WILL.

1. *Contesting Validity of.—Fraud.—Duress.—Insanity.—Undue Influence.—Undue Execution.*—In an action to contest the validity of a will, wherein the complaint alleged unsoundness of mind, undue execution, duress, fraud and undue influence, the defendants asked leave to submit an interrogatory to the jury, asking them whether the testatrix, when she signed the will, had "mind and memory sufficient to understand the ordinary affairs of life, and to act with discretion therein," whether she knew "her children and grandchildren," and whether she had "a general knowledge of the estate of which she was possessed"; but the court refused to submit the same, and substituted interrogatories asking whether the testatrix, when she signed the will, was of sound mind, whether she was then under duress, and whether the will was duly executed or was obtained by fraud, etc.
Held, that the interrogatories substituted covered only the general issues embraced in the general verdict, and that the interrogatory propounded by the defendants should have been submitted. *Todd v. Fenton*, 25
2. *Same.—Instruction.—Declarations of Testator.*—The defendants in such action having asked the giving of an instruction to the jury, properly stating the effect to be given by them, in determining the alleged unsoundness of mind, to declarations made by the testatrix at specified times before and after signing the will, and stating, also, that these declarations had no tendency to prove either fraud, duress or undue in-

fluence, the court added the words "Unless they were made at the time, and became a part of the *res gestæ*," and then gave the instruction.

Held, that the addition was erroneous. *Id.*

3. *Same.—Undue Influence.*—The court also instructed the jury in such case, that if one or more of the beneficiaries of the will, in the capacity of an agent of the testatrix, by means of such agency or otherwise, exercised "a controlling influence over her conduct, interests and will, prior to and at the date of said will, and that said will excludes the plaintiffs from participating in her estate, when they might otherwise have been subjects of her bounty, then you may find that such will is not her will, but void on account of undue influence."

Held, that the instruction was erroneous. *Id.*

4. *Construction of.—Personal Property devised Absolutely.—Life Estate. Directions to Executor to Sell.*—A testator, by his will, devised to his wife certain real estate for her life; and the will then continued: "And as to my personal estate, I direct as follows: First. To my wife I bequeath" certain personal property, which is described. "And I also order and decree, that all my property, both personal and real, *belonging* to my estate at the death of my beloved wife, provided that she outlives me, shall be sold by my executor, * * * and that said estate shall be equally distributed among my legal heirs." The wife outlived the testator.

Held, that the will gave to the wife absolutely the specific personal property mentioned.

Held, also, that the word "belonging" has reference to the time of the death of the testator's wife; and the direction to sell embraces such property only as might then belong to the testator's estate. This would not include the property specifically bequeathed to his wife.

Boling v. McClelland, 373

WITNESS.

See CONTINUANCE; CRIMINAL LAW, 3, 7; SHERIFF'S SALE, 4.

Impeachment of.—Residence.—A witness may be impeached by evidence of his reputation for truthfulness in a neighborhood where he had resided until a time six weeks prior to the time when he testifies.

L., N. A. & C. R. W. Co. v. Richardson, 43

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